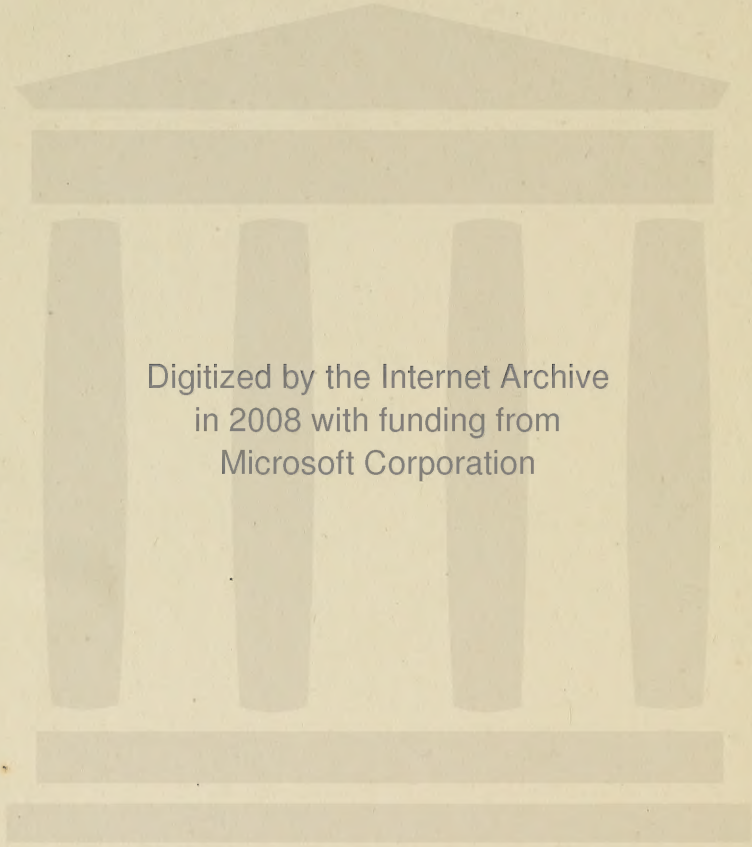

CANADIAN COMPANIES

AND THE

JUDICIAL COMMITTEE

The Law Relating to the Incorporation of Companies

And their Powers and Limitations as Determined by the Judicial Committee of the Privy Council, together with the Notes of Argument and the Judgments in the most Recent Cases

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TORONTO:
THE CARSWELL COMPANY, LIMITED
1922

PREFACE

In 1917 the writer published the notes of argument in the three appeals to the Judicial Committee in the matter of the *Insurance Reference,* (1916) A.C. 588, the *Companies Reference,* (1916) A.C. 598, and *Bonanza Gold Mining Company* v. *The King,* (1916) A.C. 516, and added an introduction dealing with the position of provincial legislation with respect to Dominion Companies.

The present volume containing the notes of argument in the recent consolidated appeal of the *Great West Saddlery Co.* v. *The King et al.* (1921) 2 A.C. 71, is intended as a continuation of that work. It has been published at the request of the Attorney-General's Department of Ontario, acting for a number of the provinces affected by that decision. The writer has been invited to express his views with respect to existing legislation in Ontario. He has found that he could do so more satisfactorily, by accompanying his criticism with a draft bill which would, in his judgment, overcome the objections taken by the Privy Council. This has led him to deal in the same manner with the special legislation of each province.

It is hoped that the review which he has made of the Privy Council decisions upon Canadian Company Law, and which has necessitated his discussing and analysing at some length the earlier cases, will prove helpful to those who are called upon to advise or adjudicate upon this feature of the Canadian Constitution.

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AND THE

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INTRODUCTION.

The judgment pronounced by the Judicial Committee of the Privy Council on the 25th of February, 1921, in the appeal of the *Great West Saddlery Co. Ltd.* v. *The King*[1] is the latest pronouncement from the highest judicial authority in the realm, respecting the powers of the Dominion on the one hand, and the Provinces on the other, to legislate with respect to Canadian companies. The judgment of the Committee in the case of the *John Deere Plow Co. Ltd.* v. *Wharton*,[2] held certain sections

[1] (1921) 2 A.C. 71.
[2] (1915) A.C. 330.

of the British Columbia Companies Act to be *ultra vires*, which required the John Deere Plow Co. to be licensed and registered in the province as a condition precedent to carrying on business. This latest decision is concerned with the company legislation of the Provinces of Saskatchewan, Manitoba and Ontario. So far as the legislation of the Province of Saskatchewan is concerned, an amendment was made to the company law in force at the time when the John Deere Plow Co. judgment was pronounced, and an effort was apparently made to do away with the provisions which appeared to be *ultra vires* by reason of their similarity in substance, with the objectionable clauses of the British Columbia Act. Notwithstanding this the Privy Council has held the legislation of all the provinces to be *ultra vires*. In publishing the notes of argument and the judgment in the Great West Saddlery case it is proposed to review the decisions of the Privy Council with respect to the powers that may be conferred upon Dominion and Provincial companies and indicate in what respects existing provincial legislation requires amendment.

This is no easy task, and any light which can be thrown on the subject by a careful study of the notes of argument of counsel, and of the remarks made by the Lords of the Privy Council during the hearing, may be welcome. It is, of course, obvious that anything said by their Lordships in the course of argument cannot be accepted as authoritative, but the remarks are illuminative, indicating as they do the individual views of the members of the Committee. They do give the atmosphere, so to speak, of the case, and the argument of counsel is much more fully reported here than will be found in the official reports.

INCORPORATION OF COMPANIES.

It is apparent when we critically consider sections 91 and 92 of the B. N. A. Act, that while the powers to incorporate companies for *provincial* objects is given to the provinces by section 92, sub-section 11, there is no specific power given the Dominion to incorporate companies where the objects of incorporation are *not provincial*. A general power to incorporate however is necessarily contained in the provision to make "laws for the peace, order and good government of Canada," contained in section 91.

This power is distinctly recognised in the case of the *Colonial Building and Investment Association* v. *Attorney-General of Quebec*.[3] There by a Statute of the Dominion the appellants were created a corporation with power "to acquire, and hold, by purchase, lease or legal title, any real estate necessary for the purpose of carrying out its undertakings; to lend money on security, by mortgage on real estate, etc." Proceedings were taken by the Attorney-General of Quebec to have it declared that the company had been illegally incorporated, the Judicial Committee said:

> "The fact that the Association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the Association was originally within the legislative power of the Dominion Parliament.[4]
>
> The company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of Incorporation, nor warrant the judgment prayed for, viz.: that the company be declared to be illegally constituted."

[3] (1883) 9 App. Cas. 157.
[4] Approved *Toronto* v. *Bell Telephone Co.* (1905), A. C. 52.

In the *Great West Saddlery Co. Ltd.* v. *The King*,[5] Viscount Haldane says:

> "For the power of a province to legislate for the incorporation of companies is limited to companies with provincial objects, and there is no express power conferred to incorporate companies with powers to carry on business throughout the Dominion and in every province. But such a power is covered by the general enabling words of section 91 which, because of the gap, confers it exclusively on the Dominion."

I.

PROVINCIAL COMPANIES.

Section 92, sub-section 11 empowers the Legislatures of the provinces to incorporate companies with provincial objects. How far the powers so conferred would authorise such companies to carry on business beyond the provincial boundaries never came up for consideration, until the question was raised by some members of the Supreme Court in the *Canadian Pacific Railway Co.* v. *The Ottawa Fire Insurance Co.*[6] Subsequently a reference in the matter of the incorporation of companies was made to the Supreme Court of Canada by the Governor-General-in-Council, and the answers of the Court[7] became the subject of an appeal to the Judicial Committee of the Privy Council. In the meantime the same question arose in the action of the *Bonanza Creek Gold Mining Co.* v. *The King*,[8] which also was taken in appeal to the Judicial Committee.

Both in the Dominion and in all the Provinces, two methods of incorporating companies are provided: first, by private Act of Parliament or of the Legislature; second, a simpler method whereby upon filing certain documents and evidence in the proper Government department, the petitioners can obtain from the Minister of the Crown letters patent, empowering them to carry on as a company any kind of business that would ordinarily be granted by a private Statute. Until the judgment of the Judicial Committee in the *Bonanza Gold Mining Co.* v. *The King*,[9] it was never suggested nor was the point raised in the Courts below, that the powers bestowed by the letters patent were more extensive than those obtained by an ordinary private Statute. The Committee, however, declared that this was the case. The Committee also held that the company in question, having been incorporated by letters patent from the Lieutenant-Governor of Ontario, had a status which enabled it to accept from the Dominion authorities the right of free mining in the Yukon Territory.

Lord Haldane says:

> "Powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another. In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. In the case of a company the legal existence of which is wholly derived from the words of the Statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies,"

This more extensive power, held by the Judicial Committee to be inherent in companies incorporated by letters patent, over purely statutory companies at once led to an amendment being made to the Com-

[5] (1921) 2 A.C. 71.
[6] 39 S.C.R. 405.
[7] 48 S.C.R. 33.
[8] (1916) A.C. 566.
[9] (1916) A. C. 566.

panies' Acts of all the provinces, whereby there was conferred on such statutory companies all the powers possessed by those incorporated by letters patent.

II.

DOMINION COMPANIES.

The Dominion therefore having a general power to incorporate all companies under the Peace, Order and Good Government provision of section 91, except those having provincial objects, and as section 91 gives pre-eminence to matters falling within the enumerated clauses of that section by expressly providing that such matters should be within the exclusive legislative authority of the Parliament of Canada, and should not be deemed to be matters of " a local and private nature " comprised in section 92, we are led to a division of Dominion companies into two classes:

A. Companies incorporated to carry on operations with respect to matters enumerated in section 91, such as banking, etc.

B. Companies not incorporated for such purposes.

The legislative authority of the Dominion with respect to these two classes of companies is markedly different.

As to the first type, it is of no moment that some of the powers conferred clearly infringe upon some one or more of the matters specifically assigned to the provinces by section 92, so long as these powers are incidental to the main purpose of the company, as in such event the provincial power is overborne.

But as regards companies of the second class this is not the case, such companies cannot encroach upon the subject matters assigned to the provinces.

A.

COMPANIES INCORPORATED TO CARRY ON OPERATIONS WITH RESPECT TO MATTERS ENUMERATED IN SECTION 91.

1. SUBSTANTIVE MATTERS OF SECTION 91.

Section 91, after enumerating certain matters over which the Dominion should have exclusive legislative jurisdiction, concludes by providing that any matter coming within this enumerated class should not be deemed to be included under 92. The decisions which we shall come to consider have drawn a line between cases which deal with matters that are of the *substance* of those enumerated, and cases which deal with matters *incidental* or *ancillary* thereto. As respects the first class, legislative jurisdiction is vested solely in the Dominion, and any attempt to legislate by the province would be *ultra vires*, as to the second class we have a field in which both the Dominion and the provinces may legislate, and in regard to which we have what has been called the *theory of overlapping powers*. We have an example of those substantive matters in *City of Toronto* v. *Bell Telephone Co.*,[10] where it was held that a Dominion telephone company was entitled without the consent of the municipal corporation, to enter upon the streets and highways of the City of Toronto, and to construct conduits, lay cables and erect poles and wires upon and along such streets and highways, although a provincial Act required the company to first obtain the consent of the municipality.

[10] (1905) A. C. 52.

2. ANCILLARY OR INCIDENTAL MATTERS.

THEORY OF OVERLAPPING POWERS.

This theory shortly stated is that some matters may be within the legislative jurisdiction of both the Dominion and the Provinces, and if the Dominion legislate it will override provincial legislation, but in the absence of Dominion legislation, Provincial legislation will be valid and effectual.

The theory sometimes referred to as the theory of the *unoccupied field* is of such importance in the light of recent decisions of the Judicial Committee, that it is necessary it should be discussed at considerable length. Its history is closely associated with the British North America Act, and the early appeals to the Judicial Committee.

THE JUDICIAL COMMITTEE.

The Quebec Resolutions constituted the most important effort to plan a federal system of self-government, since the establishment of the United States of America. It was fortunate when the bill incorporating its terms came to be drawn, that Lord Thring, the Parliamentary draughtsman of Statutes, was entrusted with the work. He was the author of the Merchants' Shipping Act, the Companies Act, and, indeed, of all the important constructive legislation of the day in England. The British North America Act will forever remain a monument to his great skill and ability.

Canada was not so happy, however, with respect to the tribunal that should be called upon to construe her charter, as she was in having Lord Thring as its author.

The Judicial Committee is not a Court of Justice but is composed of members of the King's Privy Council specially selected on account of their judicial ability, to whom His Majesty refers amongst other things, all petitions asking a reversal of colonial judgments, throughout the Empire.

The Committee is now composed of the Lord High Chancellor of Great Britain and such members of His Majesty's Privy Council as shall from time to time hold certain high judicial office in England along with certain judges from India and of His Majesty's Dominions, and more recently of six Lords of Appeal in ordinary who are paid a special indemnity for sitting in the House of Lords and the Judicial Committee. As the Committee is not a Court of Judicature but simply advises the Privy Council which in turn advises His Majesty, its opinions or judgments are not binding upon any but the Colonial Courts. English Courts of Justice have never recognised their authority. There is an additional reason for this in that the advice which the Privy Council gives to the Sovereign need not be based solely upon the legal questions involved, but may take into consideration what may be deemed by it, to be high questions of state or of Imperial Policy. The possibility of this must always be a source of weakness to the Judicial Committee in constitutional cases. Indeed on one occasion in Canada where religious prejudices were involved the soundness of their decisions was severely criticised on this ground. All this affords a cogent argument for the establishment of a final court of appeal for the Empire as was so strongly urged by Australia at the Imperial Conference of 1911.[11]

[11] Extract from the Minutes of Imperial Conference, 1911.

"Notice had been given of the following resolution by the Government of the Commonwealth of Australia 'that it is desirable that the judicial functions in regard to the Dominions and exercised by the Judicial Committee of the Privy Council should be vested in an Imperial Appeal Court which should also be the final Court of Appeal for Great Britain and Ireland.' MR. BATCHELOR pointed out that there were at present two courts of final appeal in the Empire: one the Judicial Committee of the Privy Council for the Crown colonies, India and the overseas Dominions; and the other the House of Lords for the United Kingdom. That it was an anomalous position, and unless there were serious practical difficulties in the way it ought not to be continued by the Empire as now developed. Lord Loreburn said his idea was

The functions of the Judicial Committee have grown out of the provisions, uniformly contained in the *Royal Instructions,* given to every Colonial Governor, which directed him to hear appeals from Colonial Courts to himself in Council, when the amount involved was of considerable magnitude, and reserved a further appeal from the Governor-in-Council to His Majesty in His Privy Council. The provision by which the Governor-in-Council, a non-judicial body, could overrule the judgments of Courts of Justice, is so opposed to the spirit of the age, that it is only because the power was buried in so secret and confidential a document as the Royal Instructions that we can account for the provision being retained down to modern times. This state of the law was brought home to Lord Brougham, when as Lord Chancellor he sat as President of the Judicial Committee, in the appeal of *In re Samuel Cambridge,*[12] and was compelled to quash an appeal direct from the Supreme Court of Prince Edward Island, because the provision for an appeal to the Governor-in-Council had fallen into disuse and had not been taken in that case. This, no doubt, led to the introduction of a bill amending the Act 4 Will. IV. and permitting an appeal from Colonial Courts of Justice direct to the King-in-Council.

Appeals from the Canadians Courts were not dealt with by the British North America Act, as the right rested on Royal Prerogative and Imperial Statutes. This tribunal at the time of Confederation was from the point of judicial standing at a very low level. In 1871 Lord Chancellor Hatherley, to expedite the transaction of its business, had a bill passed by the Imperial Parliament by which four members of the Judicial Committee should be appointed to receive a salary of £5,000 a year, and whose duty it should be to attend the meetings of the Judicial Committee when summoned. It was further provided that these members might be English judges or retired judges from Bengal, Bombay or Madras. Sir Montague Smith, a puisne judge of the Court of Common Pleas, accepted an appointment, and two new Judges from the East Indies were added, but so discredited was the Committee that the fourth vacancy was refused by three English judges to whom it was offered, and, finally, when this hawking around of the position was becoming a scandal, the Lord Chancellor appointed Sir Robert Collier, who was not a judge and therefore not qualified under the Act. When this obstacle was discovered, Sir Robert was appointed to the vacant judgeship in the Common Pleas for three days, and then elevated to the Judicial Committee. This job nearly proved fatal to the Government, when later on it was the subject of debate in Parliament.[1] From this time on for fifteen years the two English judges, Sir Montague Smith and Sir Robert Collier with the East Indies judges, Sir James Colville, Sir Robert Couch, Sir Barnes Peacock and Sir Arthur Hobhouse along with ordinarily one judge of standing from the English Bench formed the Committee, upon whom devolved the responsible duty of interpreting the Canadian Constitution. This is the more unfortunate, because at the very time *Russell* v. *The Queen* and *Hodge* v. *The Queen* were being decided, two inconsistent decisions which will be discussed later; when it was of the highest importance from a

'that they should add to the Highest Court of Appeal both in the United Kingdom and for the Dominions and colonies by selecting two English Judges of the finest quality, that the quorum should be fixed at say five and that the Court should sit successively in the House of Lords for the United Kingdom Appeals, and in the Privy Council for appeals from the Dominions and Colonies. In that way they would have substantially the same Court in its full strength for both classes of appeals.' He also said this was practically the same thing as the resolution called for and the system which he suggested might develop into one Court. Personally he would be pleased if it would. Lord Haldane said the Lord Chancellor's proposition was really to make one Court but to keep the old forms. The resolution was then withdrawn, but MR. BATCHELOR said: 'They looked forward to one Court of Appeal for the Empire. The two divisions seemed to be a practicable arrangement for the time being, but it ought to be understood that the proposal was merely for the time being.'"

[12] 3 Moo. P. C. 175.

[1] Parliamentary Debates (Hansard), 1872, vol. 209, p. 398. Lords Papers, 1872, vol. 18, p. 137.

national standpoint that the best judicial talent in the Empire should interpret the Constitution, the House of Lords was filled with as brilliant a galaxy of judges as can be found in its history. Cairns, Selborne, Blackburn, Jessel, Watson and many others well known to fame, were available had they been summoned to hear these appeals. To the lay mind it may not seem unreasonable to expect to find in the judgments of the Judicial Committee dealing with Canadian Constitutional cases a perfectly clear and harmonious exposition of the respective jurisdiction of the Dominion and provinces under sections 91 and 92 of the British North America Act. But the words of Chief Justice Marshall with respect to the American Constitution equally apply to ours. He says, *McCulloch* v. *State of Maryland*,[2] "the Government of the Union is acknowledged by all to be one of enumerated powers. The question with respect to the extent of powers actually granted is perpetually arising, and is one which will probably continue to arise as long as our system continues to exist."

Just as the British Constitution is to-day the product of a process of growth, so our Canadian Constitution, although presumably fixed and made immutable by the Imperial Act, has by reasons of the judgments of the Judicial Committee undergone a process of development during the more than 50 years it has been in existence. The construction placed upon sections 91 and 92 has perceptibly oscillated; swinging for a long time towards the pole of extreme provincial rights. Later on we perceive a distinct strengthening of the authority of the Parliament of Canada.

With the exception of *Russell* v. *The Queen*,[3] the principle of which has never been applied in later cases, provincial rights were upheld in a long line of decisions from 1881 onward,[4] beginning with *Citizens Ins. Co.* v. *Parsons*[5] and continuing down to *Manitoba* v. *Liquor License Holders Act* in 1902,[6] which Lord Haldane recently intimated was probably the peak of the decisions favourable to privincial rights. From 1902 to 1912 we have a series of decisions favourable to the Dominion power.[7]

The importance to Canada of a strong appellate tribunal has been emphasized when dealing with the appeals arising soon after Confederation. The same may be said with greater force to-day. The function of the Judicial Committee as was well said at the Imperial Conference in 1911, is one of the most important connecting links of the Empire, and nothing could be more disastrous than to have its authority weakened by the delivery of a hastily prepared judgment, particularly in a constitutional case involving the status and jurisdiction of a great state[8].

[2] 4 Wheaton 405.

[3] 7 App. Cas., 821.

[4] These decisions are:—*Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96; *Hodge* v. *The Queen*, 8 App. Cas. 767; *In re Reference Dominion Liquor License Act* 1883 (not reported); *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; *St. Catharine Milling Co.* v. *The Queen*, 14 App. Cas.; *Maritime Bank* v. *Receiver Gen.* 1892, A. C. 437; *Ontario* v. *Canada* (Voluntary Assignment case), 1894. A. C. 189; *Ontario* v. *Canada* (Ontario Liquor License Act), 1896, A. C. 348; *Canada* v. *Ontario* (Indian Annuities case), 1897, A. C. 199; *Brewers and Maltsters Association* v. *Attorney-General for Ontario*, 1897, A. C. 231; *Canada* v. *Ontario* (Queen's Counsel case). 1898 A. C. 247; *Canada* v. *Ontario* (*Fisheries case*), 1898, A. C. 700; *C. P. R.* v. *Bonsecours*, 1899, A. C. 367; *Manitoba* v. *Liquor License Holders*, 1902, A. C. 73.

[5] 7 App. Cas. 96.

[6] (1902) A. C. 73.

[7] *Attorney-General* v. *Hamilton Street Railway*, 1903, A. C. 324; *Dominion* v. *Bell Tel. Co.*, 1905, A. C. 5; *British Columbia* v. *C. P. R.*, 1906, A. C. 204; *G. T. R.* v. *Canada*, 1908, A. C.; *Toronto* v. *C. P. R.*, 1908, A. C. 54; *Cie. Hydraulique* v. *Continental Heat*, 1909, A. C. 194; *Burrard Power* v. *The King*, 1911, A. C. 107.

[8] Extract from letter of Lord Chief Justice Cockburn to Mr. Gladstone, 10th November, 1871:—

"The statute in question, the 34th and 35th of the Queen contains in the first section the following enactment: 'Any persons appointed to act under the provisions of this Act as members of the said Judicial Committee must be specially qualified as follows, that is to say, must at the date of their appointment be, or have been, judges of one of Her Majesty's Superior Courts at Westminster, or a Chief Justice of the High Court of Judicature at Fort William in Bengal, or Madras, or Bombay, or of the late Supreme Court of Judicature in Bengal.'

"Now the meaning of the Legislature in passing this enactment is plain and unmistakable. It was intended to secure in the constitution of the high appellate tribunal, by which appeals,

In 1907 a judgment was delivered by the Committee in the appeal of *La Compagnie Hydraulique* v. *Continental Light and Heat Co.*,[9] which cannot be harmonised with the established jurisprudence of the Privy Council on the same matter, and which has occasioned some trouble to Canadian Courts of Justice. The decision is discussed later.[10]

The judgment was pronounced by a member of the Committee who was a retired judge from the High Court of Calcutta and was not entitled to sit in House of Lords Appeals. Although, no doubt, qualified to interpret the laws of the East, otherwise he would not have been so highly commended by the Lord Chancellor to the Imperial Conference, he was evidently not familiar with the doctrine of overlapping powers in the Canadian Constitution as developed in the previous judgments of the Judicial Committee.[11]

Pursuant to the undertaking given by the Lord Chancellor at the Imperial Conference, two additional judges were appointed Lords of Appeal in Ordinary. In recent years, therefore, the Judicial Committee and the House of Lords have been composed substantially of the same members and all grounds of complaint regarding the inferiority of the former have been removed.

ORIGIN OF THE THEORY OF OVERLAPPING POWERS.

The principle is thus explained by Lord Dunedin. *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada.*[12]

> "There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and if the field is not clear and in such a domain the two legislations meet then the Dominion legislation must prevail. Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right, which may be conceded, but whether this law is truly ancillary to railway legislation."

Lord Dunedin was dealing with a case of conflict between the enumerated clauses of 91 and section 92. The same principle as will be pointed out later was applied in liquor traffic legislation, but outside this type, which is exceptional, and has never been extended, there can be no *common* field between legislation under the Peace, Order and Good Government provisions of section 91 and section 92. This is made impossible by the concluding portion of section 91, and has been most lucidly expressed by Lord Watson in *Attorney-General of Ontario* v. *Attorney-General of Canada*, at p. 360, where he says:—

> "The general authority given to the Canadian Parliament by the introductory enactments of section 91 is 'to make laws for the peace, order and good government of Canada in relation to all matters not coming within the clauses of subjects by this Act assigned exclusively to the legislatures of the province,' and it is declared but not so as to restrict the generality of these words that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may,

many of them in cases of vast importance, from our Indian possessions as well as from the rest of our Colonial Empire, are to be finally decided, the appointment of persons who have already held judicial office as judges of the land. Whether wisely or unwisely, it plainly was not intended that the selection might be made from the Bar. It was to be confined to those who were already judges, and who, in the actual and practical exercise of judicial functions had acquired, and given proof, of learning, knowledge, experience and the other qualifications which constitute judicial excellence."

And referring to the appointment of Sir Robert Collier, says:—

"It cannot be looked upon otherwise than as colourable, as an evasion of the statute, and a palpable violation, if not of its letter, at all events of its spirit and meaning."

Lords Papers, 1872, vol. 18, p. 137.

[9] (1909) A. C. 194.

[10] *Post*, p. xxv.

[11] Imperial Conference Proceedings, 1911, p. 48.

[12] (1907) A. C. 65.

[1] (1896) A. C. 348.

therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate because they concern the peace, order and good government of the Dominion. But to these matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is made by the concluding words of section 91, has no application; and in legislating with regard to such matters the Dominion has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92."

SECTIONS 91 AND 92—ARE THEY MUTUALLY EXCLUSIVE?

The Quebec Resolutions and the various drafts of the Bill show that those responsible for the British North America Act had no doubt the present sections 91 and 92 were *mutually exclusive*. In other words, they intended that there should be an absolute line of division between the two sections. Every piece of legislation that might be enacted must fall solely within the ambit of either the Dominion or the provinces, and there could not be legislative jurisdiction common to both. When the Canadian Commissioners in London revised the Resolutions and desired to confer concurrent jurisdiction in the matter of agriculture and immigration, they placed these subjects specifically in the two sections which conferred legislative power upon the Dominion and the provinces respectively. And when the law officers in England drafted the British North America Act upon the basis of the revised resolutions, they were not able to use the words *exclusive* in the introductory parts of 91 and 92 if the same subjects were to appear in both sections.[2] We find, therefore, they removed agriculture and immigration into a new section which is now 95 and reads as follows:—

"In each province the Legislature may make laws in relation to agriculture in the province, and to immigration into the province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces, and to immigration into all or any of the provinces; and any law of the Legislature of a province relative to agriculture or to immigration shall have effect in and for the province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

This theory of overlapping powers is based upon the assumption that section 91 and 92 of the British North America Act are not mutually exclusive. Indeed, Lord Atkinson in pronouncing the judgment in *Montreal* v. *Montreal Street Railway*,[3] expressly says so at p. 343, but there can be little doubt, if we analyse the Act, that this was not the conception of Lord Thring and the other law officers of the Crown in England who moulded the Quebec resolutions into the British North America Act.

The initial portion of section 91, after granting general powers to the Dominion, expressly excepts therefrom "all subjects assigned by this Act exclusively to the Legislatures of the provinces." Then follows provisions giving exclusive authority to the Parliament of Canada in twenty-nine subjects, and the section concludes by recognising the fact that the subjects enumerated in section 91 might from another aspect fall within the subject matters of section 92 and expressly provides that in such a case the legislative power of the Dominion should prevail.

It has been pointed out that the general power of taxation given to the Dominion by section 91(3) includes the power of taxation given to the provinces by section 92(2). The latter power is also declared to be exclusive, but there would seem to be no difficulty in harmonising the two provisions by limiting the taxing power of the Dominion to taxation for

[2] Pope, Confederation Documents, pp. 132, 133, 238.
[3] (1912) A. C. 333.

Dominion purposes. The same thing is to be noted with regard to the exclusive power of the Dominion with regard to "Marriage and Divorce" (section 91(26)). This includes the power to legislate with reference to "The Solemnisation of Marriage," given exclusively to the province by 92(12). These, again, can readily be harmonised by treating 92(12) as an exception to the general power given to the Dominion by 91 (26). (in re Marriage Reference (1912) A.C. 880). The last clause of section 91 recognises the fact that there may be an apparent conflict between the provisions of 91 and 92, and contemplates that in such event the Courts must, upon the facts of each case, determine where the legislative jurisdiction lies as a matter of construction.

The subject is discussed in the argument *In re the Dominion Liquor License Act* (1883-84), commonly known as the McCarthy Act. Lord Hobhouse says [4]:

> "I quite understand the argument that you must carefully weigh the two sections 91 and 92 together in order to understand what the original powers of the two classes of legislation are, but it is difficult for me to understand the argument that when on comparison of the two sections you have concluded that a particular power falls within section 92, the accident that the Dominion Parliament had exercised some power under section 91 should limit the power already found in section 92; because the two are mutually exclusive."
>
> SIR FARRAR HERSCHELL (in reply):
>
> "No, I think they are not mutually exclusive, because section 91 overrides section 92."
>
> Lord Hobhouse: It may override the construction of section 92 if you come to the conclusion that the Provincial Legislature has power under section 92, can that power be either contracted or enlarged by the Act of the Dominion Parliament."

Again in *Attorney-General of Ontario* v. *Attorney-General of Canada*,[5] during the argument Lord Watson says:[6]

> "I quite agree with your suggestion that there is no such thing conferred there by these two clauses, 91 and 92, as concurrent legislation—as I understand the words concurrent legislation—the legislation to be effectual must be by one or the other. I do not think they are joined together—but I think the result—and that does not render the present question less difficult to deal with—of recent judgments of this Board have been to establish, that there are some principles of legislation, which may be exercised by the Provincial Legislature, and so long as they are not interfered with by the Dominion Parliament, they will stand and be effectual."

In one of the latest cases, *Great West Saddlery Co., Ltd.* v. *The King*,[7] Lord Haldane, who delivered the judgment of the Committee, during the argument of Sir John Simon, said:

> "Can it be more than a question of construction? Here I may be running up against authority, but surely there was a distribution by the Imperial Parliament of powers, some to the Dominion and some to the provinces,—it is now well settled that these are the words of the legislators. How can it be said that the Dominion should prevail? Must we not construe the two?" (*post*, p. 143).

And again he says in another place (*post*, p. 178), with respect to the theory of *overlapping* powers:

> "It is a very unintelligible doctrine, but it is interesting to trace the growth of this theory which is now a well established *ratio* in many of the recent decisions of this Committee."

[4] Registrar's Collection, page 62-63.
[5] (1896) A. C. 348.
[6] Registrar's Collection, page 230.
[7] (1921) 2 A. C. 71.

In the notes of argument in the recent appeal to the Judicial Committee in *Re Combines and Fair Prices Act*,[8] Lord Haldane, as to the theory, says:

> "Then there has been set up a doctrine, the origin of which I never did know, but it is true that where there is a conflict between provincial and Dominion legislation, the legislation of the Dominion must prevail."

It will be pointed out later that it was to harmonise so far as possible *Russell* v. *The Queen* with *Hodge* v. *The Queen* and the other later decisions that the theory was adopted that 91 and 92 were not mutually exclusive, but that there was a field in which the jurisdiction overlapped. This theory had been suggested in an *obiter dictum* by Lord Selborne in *Union St. Jacques* v. *Dame Belisle*[9] with respect to provincial legislation in bankruptcy matters in the absence of bankruptcy legislation by the Dominion to which it was assigned by section 91 (10), but now it is applied in a case of conflict between "peace, order and good government," and section 92 so far as liquor traffic legislation is concerned, although the uniform later jurisprudence has held that it should be limited to a conflict between the enumerated clauses of section 91 and section 92.

As pointed out (*ante*, p. 9) there can be no *field of legislation* under "peace, order and good government" which is *common* also to section 92, because the concluding words of section 91 say that in case of such a conflict section 92 must prevail. The principle has been recently expressed by Lord Atkinson in *Montreal* v. *Montreal Street Railway*.[10]

> "As to those matters which are not specified amongst the enumerated subjects of legislation in section 91, the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the Provincial Legislature by section 92."

LIQUOR TRAFFIC DECISIONS.

This theory of overlapping powers as above mentioned was pushed to an extreme limit in a number of decisions of the Judicial Committee in which the jurisdiction of the Dominion on the one hand, and the provinces on the other, to pass liquor traffic legislation was involved. This was done as we will now shew to explain two apparently inconsistent decisions of the Committee.

We do not find, nor do we expect to find in the judgments of the Privy Council, an express disapproval of any previous judgments. Yet occasionally during the argument of appeals, when less trammelled in their language, the Lords of the Privy Council frankly admit that the decisions have not always been uniform. It would be impossible to find anyone more familiar with the Canadian Constitution than Viscount Haldane, recently Lord Chancellor of England, who, while at the Bar for a quarter of a century, was engaged in practically every Canadian appeal and whose pen has written the judgment of the Committee in the important company cases we are now considering, yet during the argument of the *John Deere Plow Co.* v. *Wharton*,[11] he is reported to have said:[12]

> "It is plain that Lord Watson did not believe in the judgment of the Board in *Russell* v. *The Queen*, and you *will* see right through this case (*Attorney-General of Ontario* v. *Attorney-General of Canada*,[1] and you will see it in earlier cases, he was endeavouring to find a foundation for the decision in the Canada Temperance Act of another kind, and he takes the initial words of section 91 (of the British North America Act), and he will not treat

[8] Registrar's Collection.
[9] L. R. 6 P. C. 37.
[10] (1912) A. C. 333, at page 343.
[11] (1915) A. C. 330.
[12] Registrar's Collection, page 124.
[1] (1896) A. C. 348.

the words 'the regulation of trade and commerce' as in itself sufficient justification for *Russell* v. *The Queen.*"

Lord Watson's disapproval of *Russell* v. *The Queen* is also indicated in his judgment, where he observes quite unnecessarily, and as if compelled to explain its weakness (*Attorney-General of Ontario* v. *Attorney-General of Canada*[2]:

> "The controversy (in *Russell* v. *The Queen*) related to the validity of the Canada Temperance Act of 1878. Neither the Dominion nor the provinces were represented on the argument. It arose between a private prosecutor and a person who had been convicted."

During the argument of the *Great West Saddlery Co.* v. *The King*, Lord Haldane, referring to his experience before the Judicial Committee in the early days says (*post*, pp. 77-78):

> "I think I may say—I had a long experience at the Bar in these cases in those days—that it was a tacit rule, a convention between judges and counsel that *Russell* v. *The Queen* was not to be cited, and we did not cite *Russell* v. *The Queen.*"

RUSSELL V. THE QUEEN, 7 APP. CAS. 829.

In 1882 this, the third Canadian appeal of capital importance, which came on to be heard by the Committee, determined that the Parliament of Canada had power to pass the Canada Temperance Act, 1878, and in the next year it also held in the appeal of *Hodge* v. *The Queen*[3] that certain regulations made under the Ontario Temperance Act were equally valid. If the judgment in *Russell* v. *The Queen* were followed out to its legitimate conclusion the judgment in the Hodge case should have been the opposite of what it was, on the contrary, it has been approved and followed in later cases.

In *Russell* v. *The Queen* the facts were as follows:

The Canada Temperance Act, 1878, prohibited the sale of intoxicating liquors in whatever localities it was brought into force by the vote of a majority of the inhabitants thereof. It was contended that this Statute was an invasion of the right of the province to legislate respecting three of the sub-sections of section 92:—

(9) Shop, saloon and other licenses in order to raise a revenue for provincial purposes.

(13) Property and civil rights in the province.

(16) Matters of a purely local or private nature in the province.

The notes of argument show[4] that at the conclusion of the appellant's argument the Committee said it was satisfied there was no jurisdiction in the province under (9) or (13), and only desired to hear argument as to (16).

The judgment points out that the procedure adopted by the Committee for the purpose of determining where the legislative jurisdiction lay, was by inquiring first does the legislation fall under section 92? If it does not, *cadit quaestio* and the Dominion must then have jurisdiction. Having decided that there was no power under 9, 13 or 16, judgment was given affirming the validity of the Act.

HODGE V. THE QUEEN, 9 APP. CAS. 117.

Next year the Committee was called upon to decide in *Hodge* v. *The Queen* upon the validity of certain regulations made under the Ontario Liquor License Act, which Act regulated, and in fact, prohibited, in part, the sale of intoxicating liquors. The provincial claim was now rested largely on another sub-section of section 92, which had not been considered by the Board in the previous case, namely: sub-section (8)—municipal institutions in the province.

[2] (1896) A. C., at page 362.
[3] 9 App. Cas. 117.
[4] Registrar's Collection, page 54.

During the argument[5] Sir Robert Collier says:

"I think this Act (Canada Temperance Act) was supported (in *Russell* v. *The Queen*) in great measure on the ground that it was an Act for the regulation of Trade and Commerce."

The Committee held that the regulations in question made pursuant to the provisions of certain sections of the Ontario Liquor License Act "were police or municipal regulations of a merely local character and did not conflict with the provisions of the Canada Temperance Act *which had not been locally adopted.*"

Some years later during the argument of the McCarthy Act Sir Farrar Herschell who, as counsel for the Dominion, was discussing the power of the province to legislate respecting liquor licenses under sub-section 8 (Municipal Institutions in the province), was interrupted by Sir Montague Smith, who said:[6] "In that case (*Russell* v. *The Queen*) the section as to municipal institutions was not argued.' Sir Farrar claimed it was, but a reference to the notes of argument (Registrar's collection) shows that Sir Montague Smith was correct. The fact that the attention of the Committee was not called to a sub-section of 92 under which the jurisdiction of the province might have been supported, may afford an explanation, but certainly not a satisfactory reason for an unsound judgment.

In *Hodge* v. *The Queen* the Committee in its judgment said:

"The principle which *Russell* v. *The Queeen and Citizens' Insurance Co.* v. *Parsons* illustrates is that subjects which in one aspect or for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91."

The judgment does not expressly state what would happen when the Canada Temperance Act was brought into operation in a district at the time governed by the provisions of the Provincial Liquor License Act. This had to be faced later on by Lord Watson in *Attorney-General of Ontario* v. *Attorney-General for Canada.*[7] In the meantime, however, with a Liberal Government in power in Ontario and an equally strong Conservative Government at Ottawa, with party feeling and local patriotism running high, the Dominion Government introduced into Parliament a new Liquor License Act, since called the McCarthy Act, which provided for the appointment by the Dominion of a Board of License Commissioners throughout Canada consisting of a county judge, a warden of a county or a mayor of a city and a third commissioner to be appointed by the Governor-in-Council. The Act provided for licenses to be issued to hotels, saloons, shops, etc., and empowered the Board to make regulations defining conditions and qualifications requisite to the obtaining of licenses, and providing penalties for selling liquor without a Dominion license. The Act was submitted to the Supreme Court of Canada, where it was held to be *ultra vires* and an appeal was taken to the Judicial Committee.

At the close of the argument it was announced by the Committee that there would be a judgment answering the questions propounded but without reasons. This was unsatisfactory to the Dominion, and a letter was sent to their Lordships by the Colonial Office at the instance of the Canadian High Commissioner pointing out the advantage which would accrue if their Lordships would issue "an authoritative declaration of the principle by which the legislative jurisdiction of the Provincial and Dominion Parliaments respectively was limited in this case, but their Lordships refused on the ground that it was not the practice except in cases of appeal to give reasons. Accordingly the judgment simply answered the question and declared the Dominion Act to be *ultra vires.* The Province of Ontario next moved in the matter by passing an amendment to the Pro-

[5] Registrar's Collection, page 20.
[6] Registrar's Collection, page 158.
[7] (1896) A. C. 348.

vincial Liquor License Act. The validity of this was referred to the Supreme Court of Canada along with an inquiry as to the power of the province to pass an Act prohibiting the sale of intoxicating liquors in the province. The Supreme Court was against the provincial power, but on appeal to the Privy Council their Lordships upheld it (*Attorney-General for Ontario* v. *The Attorney-General for Canada.*[8] Lord Watson delivered the judgment of the Committee and now gives reasons.

Taking up the power which the Parliament of Canada had to legislate under the "Peace, Order and Good Government" clause, he holds it must be confined strictly to such matters as are unquestionably of Canadian interest and importance, and says that some matters in their origin, local and provincial, might attain such dimensions as to effect the body politic of the Dominion and to justify the Parliament of Canada in passing laws for their regulation or abolition in the interest of the Dominion. He says:

> "An Act restricting the right to carry weapons of offense, or their sale to young persons within the province would be within the authority of the Provincial Legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign state, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.

It is to be observed that we have here a new ground offered to explain *Russell* v. *The Queen,* namely, that a matter ordinarily of a local and private nature may become of national importance and thereby be transferred from section 92 into section 91 and be legislated upon under the power to make law for the "peace, order and good government of Canada.

Every effort since this decision to apply the principle enunciated by Lord Watson has failed. It formed the basis of the reasons of judgment of the Chief Justice of Canada in re Insurance reference,[9] in upholding the validity of the Dominion Act requiring insurance companies to obtain licenses from the Minister of Finance at Ottawa. The Chief Justice pointed out how the business of insurance had grown from a local matter to one of national importance; that the volume of fire risks amounted to between two and three thousand millions of dollars, while life insurance in force in Canada in 1912 amounted to over one thousand millions of dollars. This was brushed aside in the Privy Council by Lord Haldane who said: (*Attorney-General for Canada* v. *Attorney-General for Alberta*)[10]

> "No doubt the business of insurance is a very important one which has attained to great dimensions in Canada, but this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. When the B. N. A. Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Bench from the Bar been well founded."

In the judgment delivered by Lord Haldane in *Attorney-General of Canada* v. *Attorney-General of Alberta, et al,* (November 11, 1921, in re Board of Commerce Act, His Lordship says:

> "No doubt the initial words of section 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in section 92, untrammelled by the enumeration of special heads in section 91. It may well be that the subjects of undue combination and heading are matters in which the Domin-

[8] (1896) A. C. 348.
[9] 48 S. C. R. 260.
[10] (1912) A. C. 588.

ion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in section 92, and is not covered by them. The decision in *Russell* v. *The Queen*[11] appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the Statutes in controversy involve, with the property and civil rights of the inhabitants of the provinces."

From the nature of the examples cited by Lord Watson taken in connection with what Lord Haldane has said, we may assume that the only cases in which local matters will ever reach Dominion importance hereafter so as to fulfill Lord Watson's condition will be upon an occasion of Canada being threatened by war or some other national calamity.

In the Ontario Liquor License Act case[12] Lord Watson also said that the Dominion legislation upheld in *Russell* v. *The Queen* could not be supported under 92 (2) and finally faces the situation where we have a Dominion and a provincial liquor law dealing with the same subject within the same territory and in conflict, and holds that in such case the provincial prohibition would be inoperative. The result of all this was that the two decisions of *Russell* v. *The Queen* and *Hodge* v. *The Queen* were harmonised by holding that the two sections were not mutually exclusive, and that each could legislate in the same field under certain circumstances.

But the spectre of *Russell* v. *The Queen* would not down; it has troubled the Judicial Committee ever since. Whenever the Dominion has desired to support its jurisdiction by virtue of "Regulation of Trade and Commerce"—91 (2) it has brought forward *Russell* v. *The Queen* and has relied on the concluding words of the judgment where it is said that

> "in abstaining from a discussion of 91 (2), they must not be understood as dissenting from the opinion of the Chief Justice of Canada, that regulation of the traffic in intoxicating liquors throughout the Dominion falls under the class of subjects—Regulation of Trade and Commerce."

Finally in the recent case of the *Great West Saddlery Co. Ltd.* v. *The King*,[1] we have a large portion of the fifth day of the argument in the Privy Council taken up with a discussion of this sub-section[1] and Lord Haldane discusses *Russell* v. *The Queen* at length along with the other liquor license cases.

That the theory of overlapping powers is the ground on which *Russell* v. *The Queen* and *Hodge* v. *The Queen* are harmonised is affirmed in the last word on the subject by the Privy Council where during the argument of the appeal in re Board of Commerce Act (1921) Lord Haldane says[2]:

> "Let us see if we can come close to this. The earlier illustration came from the liquor law. In the first place it was decided, I think, in 1883, that under the Canadian Temperance Act for the good of Canada you might set up local option, prohibition, that is to say that the people in the district of the provinces might call for prohibition, and it was decided that it was within the power of the Dominion Parliament of Canada to pass the Canada Temperance Act which enabled that to be done. A locality might ask for the application of the Act and for prohibition. That was the first step. It was said that was not regulation of trade and commerce, but it came within peace, order and good government of Canada. The next step was two years later; in *Hodge* v. *The Queen* it was decided that notwithstanding that decision and that view of the Act, the provinces might

[11] 7 A. C. 829.
[12] (1896) A. C. 348.
[1] (1921) 2 A. C. 71.
[2] Registrar's Collection, page 52.

set up local licensing systems, that is to say, they might say nobody is to sell liquor at all without a license from the provinial Government or the municipal authorities, and that of course caught the occupation of the field by the Dominion, and *it was said that should be so at any rate when the Dominion has not occupied the field,* and that is in virtue of various things, local institutions of the provinces, licensing and things that are enumerated in section 92."

With two legislative bodies entitled to make laws respecting the liquor traffic it is not surprising that the subject has been from the beginning a most fruitful source of legislative activity and consequently of litigation.[3]

It has been attempted to overcome some of the difficulties by joint legislation. One province has attempted to control the export of liquor by special legislation. Appeals involving these matters are now on their way to the Privy Council for determination[4].

OVERLAPPING POWERS—IN MATTERS ANCILLARY TO THE ENUMERATED CLAUSES OF SECTION 91.

The principle of overlapping powers may now be taken as established by the following cases:

In the *Voluntary Assignments Case, Attorney-General of Ontario* v. *Attorney-General of Canada*[5] the distinction to be made between legislation which is of the substance of the enumerated clauses of section 91 and those which are incidental or ancillary thereto is clearly pointed out.

Jurisdiction to legislate in matters of bankruptcy and insolvency is exclusively conferred upon the Parliament of Canada by section 91, yet in the absence of federal legislation it was held that legislation by the province in matters which were incidental to bankruptcy and insolvency was valid. In this case the question arose as to whether, in view of the above provisions of section 91, legislation by the province under an Act[6] respecting assignment and preferences of insolvent persons, was valid. Section 9 reads as follows:

> "An assignment for the general benefit of creditors under this Act, shall take precedence of all the judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands."

The Judicial Committee says:

> "It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various *ancillary* provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as a part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as *ancillary* to such a law and therefore within the powers

[3] *Attorney-General of Manitoba* v. *Manitoba License Holders Association*, (1902) A. C. 73.
[4] *Gold Seal Limited* v. *Dominion Express Co.*, 1920, W. L. R. Vol. II., p. 761, affirmed in the Supreme Court of Canada, not yet reported.
[5] (1894) A. C. 189.
[6] R. S. O. 1887, cap. 124.

of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature, when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence."

Toronto v. *Canadian Pacific Ry. Co*[7].

In this case Lord Collins in pronouncing the judgment of the Committee affirms the language used by Lord Dunedin in *Grand Trunk Railway of Canada* v. *Attorney-General of Canada*[8]. Here the question was as to the liability of the City of Toronto to pay a share of the cost of certain protective measures ordered by the Railway Commissioners of Canada for the purpose of safeguarding the public. His Lordship said:

> "In the present case it seems quite clear to their Lordships that if, to use the language above quoted, 'the field were clear,' the sections impugned do no more than provide reasonable means for safeguarding in the public interest the public and the railway which is committed to the exclusive jurisdiction of the Legislature which enacted them, and were, therefore, *intra vires*. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their Lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee to make an equitable adjustment of the expenses among the persons interested. Both the substantive and the ancillary provisions are alike reasonable and *intra vires* of the Dominion Legislature, and on the principles above cited must prevail, even if there is legislation *intra vires* of the Provincial Legislature dealing with the same subject-matter and in some sense inconsistent. But it seems to their Lordships that in truth there is no real inconsistency, and both may stand together."

In *City of Montreal* v. *Montreal Street Railway*,[9] the Committee says:

> "It has, no doubt, been many times decided by the Board that the two sections, 91 and 92, are not mutually exclusive, that the provisions may overlap and that where the legislation of the Dominion Parliament comes into conflict with that of a Provincial Legislature over a field of jurisdiction common to both the former must prevail."

Lord Atkinson, who gave the judgment in this case, has in mind Dominion railway legislation and his language, although general, applies only to cases where the common field lies between the enumerated subjects of section 91 and section 92. This is made clear by another part of his judgment.

La Compagnie Hydraulic v. *Continental Heat and Light Co.*[10] This decision of the Privy Council already referred to,[11] which if the principle is correctly stated in the above cases, ought to be justified as falling under the power of the Dominion to legislate respecting the matters set out in section 91, in fact cannot be supported under any of the enumerated clauses of that section.

The facts of the case are as follows: The appellants were incorporated by the Province of Quebec, *2 Edw. VII., c. 76, and 4 Edw. VII., c. 84*, and were granted the privilege of producing and selling electricity as power, heat and light within a radius of thirty miles from the village of Disraeli in Quebec. The respondents were incorporated under a Dominion Act, *60 and 61 Vict., c. 72*. Sections 7 and 8 defined their powers, which included that of manufacturing, supplying, selling, and disposing of gas and electricity. Section 8 empowered them, with the consent of the municipal council or other authority having jurisdiction over any highway or public place, to enter thereon for the purpose of making the necessary

[7] (1908) A. C. 54.
[8] (1907) A. C. 65.
[9] (1912) A. C. 333.
[10] (1909) A. C. 194.
[11] *Ante*, p. xvi.

constructions and suitable electrical contrivances. Both companies erected buildings and installed plant and machinery, to produce and distribute electrical power within the said thirty miles radius. The provincial company brought an action against the Dominion company for an injunction and damages.

Now it is to be observed that the power conferred upon the Dominion company is to manufacture, supply, and sell electricity, and does not contemplate so far as its functions are expressed that its works should connect one province with another. This does not bring the company within any of the subject-matters mentioned in the enumerated sub-sections of section 91. The nearest section is the exception to section 92 (10) " (a) lines of steamers or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province." Had this sub-section applied, the case would have been governed by *Toronto* v. *Bell Telephone Co.*[12] and *Toronto and Niagara Power Co.* v. *North Toronto.*[13] The Dominion had undoubtedly the power to incorporate the respondent company which desired to carry on its operations in more than one province, because the provincial power only extended to a company with provincial objects. *John Deere Plow Co. Ltd.* v. *Wharton.*[14] and *The Great West Saddlery Co.* v. *The King.*[15] Apparently the jurisdiction of the Dominion Parliament must be rested in this case solely upon the power to make laws for the peace, order and good government of Canada. The Dominion company, therefore, could not override the powers conferred on the appellant company by provincial legislation as the charter of incorporation which gave to the provincial company exclusive rights within a circumscribed part of the provincial territory, was clearly within its power to legislate with respect to property and civil rights in the province.

The judgment of the Judicial Committee is very short. It says:

> " The contention on behalf of the appellant company was that the only effect of the Canadian Act was to authorise the respondent company to carry out the contemplated operations in the sense that its doing so would not be *ultra vires* of the company, but that the legality of the company's action in any province must be dependent upon the law of that province.
>
> " This contention seems to their Lordships to be in conflict with several decisions of this Board. Those decisions have established that where, as here, a given field of legislation is within the competence of both the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict, as they clearly are in this case."

In the companies reference,[1] Sir Louis Davies, the present Chief Justice of Canada, referring to this decision, at page 45, says:

> " In this judgment no distinction is made between legislation by the Dominion Parliament under its general powers and legislation by it under some one of its enumerated powers, and as to the contention of counsel that the Judicial Committee were dealing with a company incorporated under the exception to sub-section 10 of section 92, which formed part of the enumerated powers of the Dominion Parliament under sub-section 29 of section 91, Sir Louis points out 'that the report does not seem to contain any ground for that suggestion. But on the contrary the judgment seems to assume that it was merely formulating propositions which had already been approved of and acted upon by the Judicial Committee.' "

[12] (1905) A. C. 52.
[13] (1912) A. C. 83.
[14] (1915) A. C. 330.
[15] (1921), 2 A. C. 91.
[1] 48 S. C. R. 331.

In the argument in the *John Deere Plow Company* v. *Wharton*[2] this decision is discussed and the only ground on which it could be supported as pointed out by Sir Robert Finday (subsequently Lord Chancellor) was that the company is included in the exception to section 92, sub-section 10.[3]

The Lord Chancellor remarked[3] that the case required "a little consideration because it is only when it is within the enumerated clause of section 91 that the Dominion prevails over something that is within section 92."

CONCLUSION.

From what has been said we are justified in concluding first, however illogical the theory of overlapping powers may be, it is now (for the present at any rate) established that there is a field in which both the Dominion and the Provinces may legislate. Second that the field is to be found in the matters which are ancillary or incidental to the enumerated clauses of section 91, and third, that although the principle has been applied to harmonise such decisions as *Russell* v. *The Queen* and *Hodge* v. *The Queen*, it has never been applied to a case where the conflict is between the power given in section 91 to make laws for the peace, order and good government of the Dominion and the provisions of section 92, except in liquor traffic legislation.

This theory of *overlapping powers*, as has been pointed out, has its foundation in the holding of the Judicial Committee that sections 91 and 92 of the British North America Act are not mutually exclusive.

The objections which have been taken to it may be summarized as follows:

First, it requires us to eliminate the word *exclusive* where it appears in these sections, and thereby violate the well-recognized canon of construction that in "construing statutes the fundamental and ordinary sense of the words is to be adhered to unless it would lead to an absurdity."

Second, the theory has been adversely criticized by probably the two greatest English lawyers who have studied the Canadian Constitution as members of the Judicial Committee.

Its application has already occasioned endless trouble in determining the extent of Dominion and Provincial legislative jurisdiction.

Only one remedy is possible, namely, declare the law to be what the framers of the Act intended. This can be accomplished by an amendment to the British North America Act declaring that the two sections are mutually exclusive, and that there is no legislative field common to both the Dominion and the Provinces.

This amendment would sweep away the foundation upon which rests the judgment of the Judicial Committee in *Russell* v. *The Queen*, and with it would disappear the judgment itself. A judgment which we have shewn was pronounced when the Canadian Constitution was in its infancy; when the Judicial Committee as ordinarily constituted was at its lowest ebb in judicial capacity. A judgment which has never been approved by the Committee in later cases, but on the contrary which Lord Haldane tells us was not believed in by Lord Watson, that notable judge, and premier member of the Judicial Committee for a quarter of a century. A judgment which by a convention between leading English counsel and the Judicial Committee, Lord Haldane declares, was never cited as an authority. A judgment which cannot be harmonized with the later Liquor Traffic decisions of the Committee of *Hodge* v. *The Queen*, 9 App. Cas. 117, the Reference concerning the competence of the Dominion Parliament to pass the Act 46 V. c. 30, and 47 V. c. 32, commonly cited as the *McCarthy Act* (not reported). *The Ontario Liquor License Act* Reference, 1896, A.C. 38, and *Manitoba* v. *The Liquor License Holders* (1902), A.C. 73.

[2] (1915) A. C. 330.
[3] Registrar's Collections, p. 159.

The beneficial result of such legislation on the Liquor Traffic Question alone, would itself justify such an amendment. The utmost frankness is necessary. The respect which all feel for the members of the Judicial Committee as at present constituted must not prevent us through delicacy, denouncing a judgment of their predecessors which for forty years has blocked national progress. A judgment which, like Banquo's Ghost, confronts the Judicial Committee every time it is called upon to interpret some phase of the Canadian Constitution.[1]

If *Russell* v. *The Queen* were swept away the Liquor Traffic Question would solely appertain to the Provincial legislatures. With it also would go the control of the breweries and distilleries and the wholesale dealing in liquors which nowhere in the British North America Act are placed under the control of the Dominion, and the only ground for so holding is the judgment in *Russell* v. *The Queen.*

The mischievous results flowing from this decision have continued throughout all these years. To-day we have pending before the Judicial Committee two Liquor Traffic appeals,[2] which have run the gamut of all the lower courts, and which involve so grotesque a legal situation that it might well form the theme of some Opera Bouffe Extravaganza. It has been solemnly declared to be, and in fact was, the law in Ontario until recently, that a person living in Toronto, for example, where whisky is distilled and held in warehouses for export, if so ill-advised as to purchase a case from his grocer, would find himself guilty of an offence punishable by fine and imprisonment, but if he should order the same whisky from a merchant in Montreal, the latter could have the case forwarded from Toronto to Montreal by the exporters, and then shipped back to the purchaser in Toronto. By virtue of this circumambulation and 600 miles of railway travel, the whisky had become a legitimate article of commerce and the transaction a lawful one.

B.

DOMINION COMPANIES INCORPORATED TO CARRY ON BUSINESS IN MATTERS NOT ENUMERATED IN SECTION 91, B. N. A. ACT.

1. COMPANIES HAVING GAIN FOR THEIR OBJECT.

The principles to be applied when construing the powers of companies incorporated under the "peace, order and good government" provisions of section 91 are thus expressed by Lord Watson, *Attorney-General of Ontario* v. *Attorney-General of Canada*:[4]

> "The general authority given to the Canadian Parliament by the introductory enactments of section 91 is 'to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces;' and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated within the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by the concluding words of section 91,

[1] *Vide. Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), A. C. 588, and Canadian Companies, pp. 20, 97-103, 138-141, 165-170, 183, and *Great West Saddlery* v. *The King* (1921), 2 A. C. 91, and post, pp. 61-62, 188-190.

[2] *Rex* v. *Nat. Bell Limited* (1921), W. W. R., vol. 1, p. 136; *Gold Seal Limited* v. *Dominion Express Co.* (1920), W. W. R. vol. 2, p 761.

[4] (1896) A. C. 348.

has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislation by section 92."

The language used by Lord Haldane recently was:[5]

"It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada, which the initial part of section 91 of the British North America Act confers does not, unless the subject-matter of legislation falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench an the subject-matters entrusted to the provincial legislatures by the enumeration in section 92."

In the course of the argument in the *John Deere Plow Co.* v. *Wharton*[6] it is stated by Sir Robert Finlay, and the statement seems to be quite accurate, though there was no express authority for it at that time in the judgments of the Committee, that all Dominion companies, including companies incorporated for one of the purposes mentioned in the enumerated clauses of 91, take their status from the general power to make laws for the peace, order and good government of Canada.

Sir Charles Fitzpatrick inquires:[7]

"Take a company incorporated for any of the purposes enumerated in section 91. Would the Dominion Parliament have power to incorporate a company for any of those purposes were it not for these general words 'The peace, order and good government of Canada' in the first part of the section?"

Sir Robert Finlay: I think not.

In the *Great West Saddlery Co.* v. *The King*, Lord Haldane in pronouncing judgment, says:

"The power of a province to legislate for the incorporation of companies is limited to companies with provincial objects, and there is no express power conferred to incorporate companies with powers to carry on business throughout the Dominion and in every province. But such a power is covered by the general enabling words of section 91 which because of the gap confer it exclusively on the Dominion."

During the argument of the appeal of *John Deere Plow Company* v. *Wharton*.[8]

Four grounds were offered to support the power of the Dominion to incorporate companies, where their purposes did not clearly fall within the enumerated clauses of section 91.

(a) The exception contained in section 92, sub-section 10, para. (a)

"Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province."

In the course of the argument in this case,[9] Mr. Raymond Asquith says:

"It has been urged that the exception referred to in the first sub-heading of section 10, namely 'lines of steam or other ships.... extending beyond the limits of the province' is a description which applies to the subject-matter which your Lordships have to consider in this case; namely, to any company incorporated for the purpose of doing business in every province in Canada. Now a criticism which was passed upon that argument of my learned friend by Lord

[5] *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), A. C. 588.
[6] (1915) A. C. 330.
[7] Registrar's Collection, page 57.
[8] (1915) A. C. 330.
[9] Registrar's Collection, page 81.

Moulton and also by your Lordship (the Lord Chancellor) was that sub-section (a) must be read as referring to and only to physical things of some sort. The sub-section refers in terms to 'works' and to 'undertakings' and I should respectfully agree, if the sub-section ended with the words 'connecting the province with any other or others of the provinces' that that construction would be a very persuasive one and difficult to disturb. THE LORD CHANCELLOR: You say 'extending' shows that it is not necessarily physical? MR. ASQUITH: Yes, my Lord."

Sir Robert Finlay in reply said:

"The point is one that I submit has really been decided by your Lordships' Board in the appeal cases for 1912, *Montreal* v. *Montreal Street Railway*[10].....Lord Atkinson, in delivering the judgment of the Board says this; he is referring to sub-section 10: 'now the effect of sub-section 10 of section 92 of the B. N. A. is, their Lordships think, to transfer the excepted works mentioned in sub-heads (a), (b), and (c) of it into section 91, and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament *'These works are physical things, not services.'*"

(b) The second ground was based upon section 92, sub-section 11, which gives the provinces power to incorporate companies with provincial objects, and it was argued that to incorporate companies for all other purposes is therefore excepted and these must all fall within sub-section 29 of section 91, viz:

"Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the provinces."

Lord Moulton in the course of argument in the John Deere case says:[11]

"'The incorporation of companies with provincial objects looks very much like an express exception of those with Dominion objects.' and the Lord Chancellor remarks:'What do you say to Lord Moulton's suggestion as to head 29 of section 91——it might be said that the incorporation of companies with provincial objects expressly excludes the incorporation of companies with Dominion objects?

"SIR ROBERT FINLAY: I submit not, my Lord. What that means is this: Head 10 of section 92——

"THE LORD CHANCELLOR: I am bound to say that my present impression is to think that those words are satisfied which we are talking of, by head 10.

"SIR ROBERT FINLAY: Yes, my Lord.

"LORD MOULTON: They are satisfied, but I cannot help thinking that head 29 meant that the things which the enumeration in section 92 clearly excludes from provinces are intended to go into 29 and it is quite clear that the incorporation of Dominion companies is clearly excluded by 11.

"THE LORD CHANCELLOR: I should have said these were by implication.

"SIR ROBERT FINLAY: Yes, my Lord, and I submit that the words expressly excepted really point to the very express exception in head 10 of section 92.

"THE LORD CHANCELLOR: You say it is not excepted—it is not expressly excepted.

"SIR ROBERT FINLAY: Yes, my Lord.

"THE LORD CHANCELLOR: By an affirmative expression?

"SIR ROBERT FINLAY: Yes, my Lord, and there you have got in head 10 an enumeration of cases to which the power of the Dominion would apply."

[10] (1912), A. C. 333.
[11] Registrar's Collection, page 57.

(c) The third ground suggested was that all the powers exercisable by Dominion companies in matters not falling under the enumerated clauses of section 91 are derived solely from the general power to make "laws for the peace, order and good government of Canada." In other words it was urged that as the Dominion companies are entirely outside the legislative ambit of section 92, the Parliament of Canada can endow them with any powers it pleases under the general authority to make laws for the peace, order and good government of Canada, and that the provincial legislature has no power to interfere with such companies. This contention did not avail in the appeal of the *Citizens Insurance Co.* v. *Parsons.*[12]

Here a Dominion Insurance Company contended it was not bound by certain legislation passed by the Province of Ontario which prescribed the only conditions which should be deemed part of every contract of insurance made in the province. The Judicial Committee held that this legislation was valid and binding, having been made pursuant to the power given by 92 (13) "Property and Civil Rights Within the Province." The Committee does not state what, if any, powers a company of this class obtains from 91 (2) but simply confines itself to saying:

> "It is enough for the decision of the present case to say that in their view its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade such as the business of fire insurance in a single province."

In the *Colonial Building and Investment Association* v. *Attorney-General of Quebec,*[13] we have nothing said with respect to the source from which the company obtains its powers and capacities, whether from "peace, order and good government" alone, or with the assistance of 91 (2). We got no further light on this question in the later decisions of the Judicial Committee with respect this type of company till the case of *La Compagnie Hydraulique* v. *Cont. Heat and Light Co.*[1] Here a decision was given, as pointed out above, so unsatisfactory that it affords no help on this point.

(d) The last ground raised was that in addition to "peace, order and good government," Dominion companies obtain some powers and capacities under section 91(2) "Regulations of Trade and Commerce." It was not until the decision in the *John Deere Plow Company* v. *Wharton,*[2] that the status and capacities of Dominion companies were thoroughly considered and the powers of Dominion trading companies were assigned not only to the general power under peace, order and good government, but also to 91(2) the regulation of trade and commerce.

SECTION 91(2). THE REGULATION OF TRADE AND COMMERCE.

No clause of the British North America Act has been so frequently cited before the Judicial Committee to explain the exercise of Dominion legislative power as section 91(2), but until recently with little avail. Although the regulation of trade and commerce is discussed at length in *Citizens Insurance Co.* v. *Parsons* and certain examples are given of what the Committee thinks is included in this expression, no absolute definition was attempted. Throughout the long series of liquor traffic cases which came to the Judicial Committee, the extent to which the regulation of trade and commerce could be relied upon as a basis for Dominion legislation, was a constant matter of discussion, with no very satisfactory results.

In the *John Deere Plow Co.* v. *Wharton,*[3] Lord Haldane, after affirming the interpretation placed upon "the regulation of trade and commerce" in the case of *Citizens Insurance Co.* v. *Parsons,* says:

[12] 7 A. C. 96.
[13] 9 App. Cas. 157.
[1] (1909) A. C. 194.
[2] (1915) A. C. 330.
[3] (1915) A. C. 330.

"This head must, like the expression 'property and civil rights in the province,' in section 92, receive a limited interpretation. Their Lordships think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed upon such powers."

In the Insurance Reference[4] we find in the notes of argument of counsel (Canadian companies, pp. 156-166) a very full discussion of what is and what is not included under section 91(2).

In delivering the judgment of the Committee in that case all that Lord Haldane ventures to say respecting the construction to be placed upon 91(2) is:

"Their Lordships think that as a result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces."

In *Montreal* v. *Montreal Street Railway*,[5] Lord Atkinson, speaking for the Committee, would place 91(2) regulation of trade and commerce on no higher plane than the power to legislate for peace, order and good government of Canada, and would restrict the expression in the same way, whenever it comes into conflict with section 92.

The last word on the subject is contained in the statement of Lord Haldane during the argument of the Board of Commerce Reference[6]

"Must not it be taken that since the 1896 case (*Attorney-General of Ontario* v. *Attorney-General of Canada*,[7] at all events, perhaps earlier, sub-section 2 of section 91 must be taken as containing merely ancillary powers. A power that can be exercised so as to interfere with a provincial right only if there is some paramount Dominion purpose as to which they are applicable."

What is meant by this? "Ancillary" to what? Has he in mind legislation under some other of the enumerated clauses of section 91, or does he refer to legislation under "peace, order and good government?" If the latter, he can only have reference to legislation in matters which are excluded from section 92, such as Dominion companies, or a subject like the liquor traffic which by its growth has lost its local and private character and became of national importance. As mentioned above, so far, no subject except liquor traffic control, has succeeded in rising out of the chrysalis stage of 92, and it is doubtful if it will ever have a companion or rival. The question, therefore, as far as cases of this class are concerned, is probably quite academic.

2. COMPANIES NOT HAVING GAIN FOR THEIR OBJECT.

There still remains under the heading of Dominion Companies certain companies not having gain for their object and, therefore, which obtain no powers under 91(2). There would appear to be, no doubt, that companies of this type cannot obtain any powers by virtue of their incorporation which will conflict with the legislative jurisdiction of the provinces under section 92. Companies of this kind were referred to during the argument of the *John Deere Plow Co.* v. *Wharton*,[8] where Lord Haldane says:

"Power to incorporate a company may be for other purposes besides trade and commerce. It may be for charitable purposes, it

[4] (1916) A. C. 588.
[5] (1912) A. C. 353.
[6] (1921) not yet reported. Registrar's Collection, page 10.
[7] (1896), A. C. 348.
[8] Registrar's Collection, p. 72.

may be for public purposes, it may be what is called a public utility company. It need not be a trading company, therefore why should you invoke the words ' regulation of trade and commerce ' to enable companies which are trading companies to be incorporated when you could incorporate them like all other companies under the general powers."

No companies of this character have had their status questioned before the Judicial Committee of the Privy Council.

C.

(a) PROVINCIAL LEGISLATION AFFECTING DOMINION COMPANIES.

1. WHERE INTRA VIRES.

We have still to consider the extent to which Dominion companies may be affected or controlled by provincial legislation. On the positive side three specific matters have been mentioned by the Judicial Committee where provincial legislation is *intra vires*. As to these Lord Haldane says, *John Deere Plow Co., Ltd.* v. *Wharton*:[9]

" It is true that even where a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application under the powers conferred by section 92."

" Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the Statutes of the province as to Mortmain: *Colonial Building and Investment Assn.* v. *Attorney-General for Quebec*,[10] or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising revenue, a license to trade which affects a Dominion company in common with other companies: *Bank of Toronto* v. *Lambe*.[11] Again such a company is subject to the powers of the province relating to property and civil rights under section 92 for the regulation of contracts generally: *Citizens Insurance Co.* v. *Parsons*."[1]

In addition to these instances Lord Haldane says in the same judgment:

" It might have been competent to the Provincial Legislature to pass laws applying to companies without distinction and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets in the province should under a Statute of general application regulating procedure give security for costs."

2. WHERE NOT INTRA VIRES.

In *John Deere Plow Co., Ltd.* v. *Wharton*,[2] Lord Chancellor Haldane also deals at greater length with the problem on the negative side. He discusses the things which the Provincial Legislature cannot do with respect to Dominion companies. He first lays down broadly what the Dominion companies have received by virtue of their incorporation, using the following language:

" The power of legislating with reference to the incorporation of companies with other than provincial objects belongs exclusively to the Dominion Parliament."

" The power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of

[9] (1915) A. C. 330.
[10] (1883) 9 A. C. 157, at p. 167.
[11] 12 A. C. 575.
[1] 7 A. C. 96.
[2] (1915) A. C. 330.

companies the objects of which extend to the entire Dominion should be exercisable and what limitation should be placed on such powers." And he concludes:

"It is enough to the present purpose to say that the province cannot legislate so as to deprive a Dominion company of its *status and powers.*"

In the case of the *Great West Saddlery Co., Ltd.* v. *The King*,[3] he says:

"If, therefore, in legislating for the incorporation of companies under Dominion law and in validly endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the province, they cannot be interfered with by any provincial law in such a fashion as to derogate from their status and the consequent capacities, or, as a result of the restriction, to prevent them from exercising the powers conferred on them by Dominion law."

He also says, referring to the John Deere case:

"Their Lordships observed, however, that when a company had been incorporated by the Dominion Government with powers to trade in every province it may not the less consistently with the general scheme, be subject to provincial laws of general application, such as laws imposing taxes, or relating to Mortmain, or even requiring licenses for certain purposes, or as to the forms of contracts; but they were careful not to say that the sanctions by which such provincial laws might be enforced could validly be so directed by the provincial legislatures as indirectly to sterilise or even to effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred."

Having enumerated these general principles he proceeds to criticise the features of the legislation that was objectionable.

In the John Deere case he says:

"Those provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellate company to obtain a license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising the powers conferred upon it, or of suing in the Courts, are inoperative for these purposes."

In the Great West Saddlery case, after quoting the provisions of the Ontario Companies Act, he says:

"These conditions do not appear to their Lordships to be merely a means for the attainment of some exclusively provincial object, such as direct taxation for provincial purposes. They apparently assume a general right to limit the exercise of the powers of extra-provincial companies if they seek to exercise those powers within Ontario."

He also points out that the methods by which even direct taxation may be enforced might be restricted to the bringing of an action with the usual consequence which was all that was involved in the leading case of the *Bank of Toronto* v. *Lambe*.[4]

(b) DOMINION LEGISLATION AFFECTING PROVINCIAL COMPANIES.

As mentioned above,[5] the Dominion, by the Insurance Act of 1910, section 4, attempted to prevent all companies, underwriters or their agents from carrying on the business of life insurance without first having a license for that purpose granted by the Minister of Finance of Canada and imposed a penalty by section 70 for violating this provision. The Judicial

[3] (1921) 2 A. C. 71.
[4] 12 A. C. 575
[5] *Ante*, p. xxxii.

Committee held that this legislation constituted an interference with the status and civil rights of the provinces, was beyond the legislative power of the Dominion, and that notwithstanding the extent of the insurance business transacted in Canada, this feature could never afford a ground for holding it was a subject that had outgrown its character of a local and private matter so as to be legislated upon under peace, order and good government, for the reasons mentioned by Lord Watson in *Attorney-General of Ontario* v. *Attorney-General of Canada.*[6] Lord Haldane proceeded to say:

> "The Act would have expressly enumerated it in section 91 as it did with the subject of Banking if it were deemed a matter for giving legislative control to the Dominion."

D.

DISCRIMINATION AGAINST DOMINION COMPANIES IN PROVINCIAL TAXATION.

It was alleged during the argument before the Judicial Committee that one object which the Provinces had in hampering Dominion companies by legislation, was to encourage new companies to obtain Provincial rather than Dominion incorporation, and thereby add to the provincial revenue. If so, the question at once arises to what extent can a province discriminate by exercising its power of taxation under section 92(2) so as to compel Dominion companies to bear a higher tax than similar companies incorporated by the province. The only province bold enough plainly to attempt this is New Brunswick, where by the Corporation Tax Act, 1920, as amended in 1921, all extra-provincial companies are required to pay a special tax based upon their capitalization. The decision of the Judicial Committee in the case of *Bank of Toronto* v. *Lambe*[7] does not help us. There the Quebec Act, the validity of which was in question, enforced the same tax on all banks doing business in the province. The Committee said:

> "Then it is suggested that the Legislature can lay on taxes so heavy as to crush a bank out of existence, and so nullify the power of Parliament to erect banks. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act."

In the matter of the Brewers and Distillers' Licenses in Ontario, the Government of Ontario, referred to the Court of Appeal,[8] the question of the validity of certain provincial legislation, and one of the questions asked was: could the legislature in order to raise a revenue for provincial purposes, require brewers, distillers and other persons duly licensed by the Dominion of Canada, to take out a license from the province and pay a license fee? And the further question was asked: "If so, must one and the same fee be exacted from all such brewers, distillers and persons?" The Court of Appeal answered the first question in the affirmative, and the last in the negative. It would appear, however, that the point involved in the last question was really: must the license fee be the same for all brewing companies whatever their capitalization? The question of provincial as opposed to extra-provincial companies was not involved. This judgment was affirmed in the Judicial Committee, but the last question was not answered, as counsel for the appellants considered that the answer of the Court of Appeal to this inquiry was correct. Some light is thrown on the question by the judg-

[6] (1916) A. C. 588.
[7] 12 A. C. 575.
[8] *Brewers and Maltsters of Ontario* v. *The Attorney-General for Ontario* (1897) A. C. 231.

ments of the Judicial Committee in the John Deere case and also in the Great West Saddlery case. In the former Lord Haldane, referring to the *Bank of Toronto* v. *Lambe*,[9] says:

> " A Dominion company could not escape the payment of provincial taxes, even though these may assume the form of requiring as the method of raising revenue, a license to trade which affects a Dominion company in common with other companies."

Again he says, at the same page:

> " It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to *provincial laws of general application* enacted under the powers conferred by section 92."

At another place in the same case he says:

> " The question is not one of enactment of laws affecting the *general public* in the province and relating to civil rights or taxation, etc.

In the later case, *Great West Saddlery Co.* v. *The King*,[10] he says:

> "Their Lordships however observed that when a company has been incorporated by the Dominion Government with powers to trade in any province, it may not the less consistently with the general scheme be subject to provincial laws of *general application*, such as laws imposing taxes."

Again he says (at p. 120):

> " If the condition of taking out a license had been imposed simply for the purpose of obtaining payment of a direct tax for provincial purposes," or " of causing the doing by the *public generally* of some act of a purely local character," it would have been requisite to see, as was pointed out by Lord Herschell in delivering the judgment of the Judicial Committee in the Brewers and Maltsters' case,[11]—that the provincial legislation was not under the guise of enforcing such direct taxation in the form of which he was speaking as being within their power, really doing something else, such as enforcing indirect taxation."

The most pertinent remark in this judgment regarding discrimination is to be found where he is dealing with the Saskatchewan Act and where he says (at p. 123):

> " If the acts had merely required a Dominion company within a reasonable time after commencing to carry on business to register the name and other particulars in the provincial register and *to pay fees not exceeding those payable by provincial companies*, and had enforced upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and *levying a tax*."

This qualification of the right to impose fees for registration or taxation by adding the words ' not exceeding those payable by provincial companies " would seem to indicate that in the view of the Committee, discrimination in taxation against Dominion companies might be an invasion upon the status and capacities of Dominion companies.

It is, of course, obvious that this discrimination might go so far as practically prevent Dominion companies from entering the provincial field for business purposes. At any rate, atlhough there may be difficulties in drawing the line, the recent judgments of the Judicial Committee would seem to show that *discrimination in taxation* of an *unreasonable or unfair character* is *ultra vires* of the provinces.

[9] (1915) A. C. 330, and Canadian Companies, p. 7.
[10] (1921) 2 A. C. 91, at p. 100.
[11] (1897) A. C. 231, at page 237.

E.

COMPANY LEGISLATION BY THE PROVINCES.

REGISTRATION OF DOMINION COMPANIES.

As has been pointed out above, Lord Haldane said in the John Deere case,[1] and also in the Great West Saddlery case,[2] that a provincial law applying to companies without distinction requiring registration of Dominion companies for certain limited purposes, such as the furnishing of information, might be proper, but the penalty to be exacted in enforcing such a law should not be so drastic as to destroy the capacities and the powers which the Dominion had conferred. It would follow from this, that if the information required goes far beyond what is asked from local companies, so that the conclusion is forced on one, that the minute details of their business are not demanded *bona fide*, but for the purpose of placing Dominion companies at a disadvantage as regards local companies, such legislation is not permissible and will be held to be *ultra vires*. There is a great difference between the legislation of the different provinces in this regard.

In Quebec and Alberta, Dominion companies are excluded from the definition of extra-provincial companies and registration is not required; whereas, in Ontario, Nova Scotia and particularly British Columbia the most complete information is demanded. With so wide a divergence of views amongst the provinces, it is impossible to frame a uniform Companies Act which will be acceptable to all. I have, therefore, in the proposed legislation which follows, taken the present provincial Acts, and have made such changes as seemed to me necessary to comply with the judgments of the Judicial Committee.

ONTARIO.

In the *Great West Saddlery Co., Ltd.* v. *The King*[3] the Ontario legislation attacked was contained in the Extra-Provincial Corporations Act, chapter 179 of the Revised Statutes of Ontario, 1914. The Judicial Committee make use of the following language with respect to this legislation:

> "As to Ontario the Statute impugned is the Extra-Provincial Corporations Act in its application to Dominion companies. Their Lordships have come to the conclusion that the real effect of this Act, as expressed or implied by its provisions, is to preclude companies of this character from exercising the powers of carrying on business in Ontario to the same extent as in other parts of Canada unless they comply with a condition sought to be imposed, that of obtaining a license to do so from the Government of the province. By section 7 such companies are expressly prohibited from doing so, and the provision in section 9(2) that no limitations or conditions are to be included in such a license as would limit a Dominion company, for example, from carrying on in the province all such parts of its business, or from exercising there all such parts of its powers, as its Act or charter of incorporation authorises, does not in their Lordships' opinion sufficiently mend matters. For the assertion remains of the right to impose the obtaining of a license as a condition of doing anything at all in the province. By section 11 the grant of the license is made dependent on compliance with such regulations as may happen to have been made by the Lieutenant-Governor-in-Council under sections 2 and 10 of the Act. By section 16, and also under section 7 itself, an extra-provincial corporation required to take out a license is to be fined for not doing so, and, under section 16, is to be

[1] (1915) A. C. 330, at p. 343 and Canadian Companies, p. 7.
[2] (1921) 2 A. C. 91, at p. 123 and *post*, p. 2.
[3] (1921) 2 A. C. 91.

incapable of suing in the courts of the province. Their Lordships are of the opinion that these provisions cannot be regarded as confined only to such limited purposes as would be legitimate, and they are, therefore, *ultra vires.*"

The result of this judgment is to nullify the provincial Statutes so far as Dominion corporations of the same type as these in question in this appeal are concerned.

It is pointed out in the same judgment where the Judicial Committee is dealing with the Saskatchewan legislation that a reasonable provision requiring the Dominion company to give certain information regarding its affairs would be *intra vires.* In the proposed amendment that follows, this is provided for.

SUGGESTED AMENDMENTS TO ONTARIO LEGISLATION.

His Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows:

The Extra-Provincial Corporations Act, being chapter 179 of the Revised Statutes of Ontario, 1914, is amended as follows:

1. Section 2, sub-section (a) is amended by adding thereto the words " but shall not include a Dominion corporation."

2. Section 2 is amended by adding thereto the following words: "(d) Dominion corporation means a corporation created by or under the authority vested in the Parliament of Canada by the British North America Act."

3. Section 4 is amended by striking out the expression " Class 8. Corporations created by or under the authority of an Act of the Dominion of Canada and authorised to carry on business in Ontario."

4. Section 4 is amended by striking out the expression " Class 9. Corporations not coming within any of the classes 1-8 " and inserting in the place and stead thereof the expression " Class 8, Corporations not coming within any of the classes 1-7."

5. Section 5 is amended by striking out the expression " or 8 " where the same appears therein.

6. Section 6 is amended by striking out the figure 9 where the same appears and substituting the figure 8 therefor.

7. Sections 7 and 9 are respectively amended by striking out the expression " or 9 " wherever the same appears therein.

8. Section 9, sub-section (2) is amended by striking out the expression " or class 8 " where the same now appears therein.

9. Section 10, sub-section (1) is amended by inserting after the word " Regulations " in the second line thereof the words " except as to Dominion corporations."

10. Section 14 is amended by adding thereto the following: (A) " Every Dominion corporation carrying on business in Ontario shall not later than the eighth day of February in each and every year after the date when it began so to carry on business make and transmit to the Minister a statement under oath and according to a reasonable and proper form approved of by the Lieutenant-Governor-in-Council containing information similar to that required under section 135 of the Ontario Companies Act and every Dominion company making default in compliance with this provision shall incur the penalty provided in such cases for provincial companies by virtue of said section 135 of the Ontario Companies Act.

11. Section 16, as amended by the Statutes of 1918, chapter 20, section 31, is further amended (a) by striking out the expression " or 9 " in the second line thereof and (*b*) by striking out the figure " 9 " where it appears in the subsequent part of said section as amended, and substituting the figure " 8 " therefor.

MANITOBA.

In the judgment of the Judicial Committee in *Great West Saddlery* v. *The King et al.*,[4] the following reference is made to the objectionable legislation of Manitoba:

> " Taking next the Companies Act of Manitoba, Part IV. of this Act deals with extra-provincial corporations, including Dominion companies. The effect of the scheme of this part does not appear to their Lordships to differ in any feature that is material from that of the Ontario Act. *Inter alia,* a Dominion company must take out a license which it is entitled to receive if it complies with the provisions of the Act and with regulations to be made by the Lieutenant-Governor-in-Council. There may, under section 111, be limitations and condition specified in the license, and if the company makes default in complying with these or certain other provisions, the license may be revoked under section 121. Unless the company obtains a license it cannot, nor can any of its agents, carry on business in Manitoba. Penalties are imposed for carrying on business without a license, and so long as unlicensed the company cannot invoke the jurisdiction of the Courts of the province. It does not alter the scope of these provisions that by section 126 fees are payable for the license, to be applied to the benefit of the revenue of the province.
>
> " Their Lordships are unable to take the view that these sections regarded together are directed solely to the purposes specified in section 92. They interpret them, like those of the Ontario Statute, as designed to subject generally to conditions the activity within the province of companies incorporated under the Act of the Parliament of Canada. The restriction in this Statute as to the holding of land cannot be severed from the general provisions as to licensing so as to make those restrictions enforceable as being in the nature of Mortmain legislation."

The Manitoba Statute is largely a replica of that of Ontario, so the amendment proposed largely adopts the corresponding provisions suggested for Ontario.

It is as follows:

SUGGESTED AMENDMENTS TO MANITOBA LEGISLATION.

His Majesty by and with the advice and consent of the Legislative Assembly of Manitoba enacts as follows:

The Companies Act, being chapter 35 of the Revised Statutes of Manitoba, 1913, is amended as follows:

1. Section 106 is amended by adding thereto the words " but shall not include a ' *Dominion corporation,*' and the words ' *Dominion corporation* ' means a corporation created by or under the authority vested in the Parliament of Canada by the British North America Act.'

2. Section 108 is amended by striking out the words " Class V. (Corporations other than those mentioned in section 107) created by or under the authority of an Act of the Parliament of Canada and authorised to carry on business in Manitoba.

3. Section 108 is amended by striking out the expression " Class VI." and inserting in the place and stead thereof the expression " Class V."

4. Section 109 is repealed.

5. Section 110 is amended by striking out the figures VI. and substituting the figure V. therefor.

6. Sections 111, 118, 122, 126 are respectively amended by striking out the expression " or VI." wherever the same appears therein.

[4] (1921) 2 A. C. 91.

7. Section 120 is amended by adding thereto the following sub-section (a) " Every Dominion corporation shall not later than the eighth day of February in every year after the date when it begins to carry on business in Manitoba, make and transmit to the Provincial Secretary a statement under oath and according to a reasonable and proper form approved by the Lieutenant-Governor-in-Council containing information similar to that required under section 80 of this Act, and every Dominion corporation making default in complying with this provision shall incur a penalty of twenty dollars for every day during which default continues and every director, manager or secretary who shall knowingly and wilfully authorise or permit such default shall incur the like penalty, but such penalties shall be recoverable only by action at the suit of the Crown or of a private person suing on his own behalf with the written consent of the Attorney-General.

SASKATCHEWAN.

The Companies Act which was under consideration in the *Great West Saddlery Co.* v. *The King*,[5] was chapter 14 of the Statutes of 1915. Some unimportant amendments were made in the year 1916-1917. Sections 23, 24, 25, 29, 30 are discussed in the judgment in the following terms:

> " The Statute remaining to be considered is that passed by the Legislature of Saskatchewan in 1915, a general Companies Act which, however, contains provisions applicable to Dominion companies. By section 23, if such companies carry on business in Saskatchewan, they must be registered under this Act, and if they carry on business without registering, the companies, and also the agents acting for them, are made liable on summary conviction to penalties. By section 24 such companies are entitled to be registered on complying with the provisions of the Act, and on paying the prescribed fees. They are also liable to pay annual fees. By section 25 such companies may, upon certain conditions, receive a license to carry on business in Saskatchewan, and if they carry on business without a license are guilty of an offence and liable to penalties. By section 29, where the Registrar satisfies himself in the prescribed manner that a company registered under the Act has ceased to carry on business, he may strike the company off the register, and it is then to be dissolved. By section 30 if the registration fees prescribed by the regulations made by the LieutenantGovernor-in-Council be not paid, the Registrar is to strike the company off the register.
>
> " Here again their Lordships think that the Provincial Legislature has failed to confine its legislation to the objects prescribed in section 92 and has trenched on what is exclusively given to the Parliament of Canada by the British North America Act. If the Act had merely required a Dominion company, within a reasonable time after commencing to carry on business in Saskatchewan, to register its name and other particulars in the provincial register and to pay fees not exceeding those payable by provincial companies, and had imposed upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and levying a tax. But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion. Further, if it is the intention and effect of the Act that a Dominion company when registered in the province shall be subject (by virtue of the

[5] (1921) 2 A. C. 71; 58 D. L. R. 1.

definition section or otherwise) to the general provisions of the Saskatchewan Companies Act, or shall become liable to dissolution under section 29, the Act would be open to question on that ground; but it is right to say that such a construction was disclaimed by counsel for the Attorney-General of Saskatchewan and (as regards the liability to dissolution) has been excluded by an amending Act passed while these proceedings were pending. Section 25 of the Saskatchewan Act, which required a Dominion company to obtain a license, stands on the same footing as the enactments in Ontario and Manitoba which have been held void as *ultra vires;* and in this case also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground."

The result of this judgment, as in Ontario and Manitoba cases, is to almost nullify the Provincial Statute so far as it affects Dominion companies of the same type as the Great West Saddlery Co., Ltd., are concerned.

The only powers which the Provincial Legislature has with respect to Dominion companies in the matters contained in the Companies Act is to require information to be furnished, such as is contained in section 37, but the imposition of a penalty to which the company becomes liable on summary conviction has appeared so objectionable to the Judicial Committee that in the draft amendment herein suggested the non-compliance with the provision of the Statute is made enforceable only by a civil action. A provision of this kind was contained in the Statute of Quebec, *45 Vic. c. 22* which was upheld in the case of the *Bank of Toronto* v. *Lambe*.[6]

The following amendment to the present Companies Act, R.S. of S. cap. 76, would seem to meet the criticism of the Judicial Committee.

SUGGESTED AMENDMENT TO SASKATCHEWAN LEGISLATION.

His Majesty by and with the advice and consent of the Legislative Assembly of Saskatchewan enacts as follows:

The Companies Act, 1915, being cap. 76 of the Revised Statutes of Saskatchewan, is amended in the manner hereinafter set forth:

1. Sub-section 3 of section 3 is amended by adding at the end thereof the words " or a Dominion company."

And by adding thereto as sub-section 3 (a) the words " Dominion company " means a company created by or under the authority vested in the Parliament of Canada by the British North America Act.

2. Sub-section 5 of said section 3 is amended by adding at the end thereof the words " but does not include a Dominion company."

3. Section 37 is amended by adding at the end thereof the words and figures following:

(4) Every Dominion company shall not later than the first day of March in each year after the date when it began to carry on business in Saskatchewan forward to the Registrar a return specifying the particulars mentioned in sub-section 1 (a) to 1 (m) both inclusive hereof; and every Dominion company which neglects or refuses to file the above return within the period limited therefor shall become liable to pay a penalty to His Majesty for the use of the Province of Saskatchewan the sum of $5.00 for every day during which the default continues, and such sum may be recovered by an action brought in the name of the Registrar in any Court of competent jurisdiction.

BRITISH COLUMBIA.

The sections of the Companies Act of British Columbia applicable to Dominion companies were fully considered in the appeal of the *John Deere Plow Co.* v. *Wharton*.[7]

[6] (1887) 12 A. C. 575.

[7] (1915) A. C. 330.

In the judgment of the Committee the following is said with respect to the legislation on this question:

"THE LORD CHANCELLOR: Turning to the relevant provisions of the British Columbia Companies Act, these may be summarised as follows: An extra-provincial company means any duly incorporated company other than a company incorporated under the laws of the province or the former colonies of British Columbia and Vancouver Islands (s. 2). Every such extra-provincial company having gain for its object must be licensed or registered under the law of the province, and no agent is to carry on its business until this has been done (sec. 139). Such license or registration enables it to sue and to hold land in the province (s. 141). An extra-provincial company, if duly incorporated by the laws of, among other authorities the Dominion, and if duly authorised by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the Provincial Legislature extends, may obtain from the Registrar a license to carry on business within the province on complying with the provisions of the Act and paying the proper fees (s. 152). If such a company carries on business without a license it is liable to penalties (s. 167), and the agents who act for it are similarly made liable, and the company cannot sue in the Courts of the province in respect of contracts made within the province (s. 168). The Registrar may refuse a license when the name of the company is identical with or resembling that by which a company, society, or firm in existence is carrying on business, or has been incorporated, licensed, registered, or when the Registrar is of the opinion that the name is calculated to deceive, or disapproves of it for any other reason (s. 18) . . . . . It follows from these premises that these provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes.

"It might have been competent to that Legislature (British Columbia) to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should, under a Statute of general application regulating procedure give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under s. 92 to the Provincial Legislature."

In the judgment in the *Great West Saddlery Co* .v. *The King*,[5] the John Deere Plow Co. case is analyzed and explained at great length, (pp. 98, 99, 100. It is there said:

" Their Lordships, however, observed (in the John Deere case) that where a company has been incorporated by the Dominion Government with powers to trade in any province, it may not the less, consistently with the general scheme, be subject to provincial laws of general application, such as laws imposing taxes and relating to Mortmain, or even requiring licenses for certain purposes, or as to the forms of contracts; but they were careful to say that the sanctions by which such provincial laws might be enforced could val-

[5] (1921) 2 A. C. 91.

idly be so directed by the Provincial Legislatures as indirectly to sterilise or even effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred."

Sections 152 and 153 of the Old Act provide as follows:

LICENSES.

"152. Any extra-provincial company may obtain a license from the Registrar authorising it to carry on business within the province on compliance with the provisions of this Act, and on payment to the Registrar in respect of the several matters mentioned in table B in the first schedule thereto the several fees therein specified.

CHARTER AND POWER OF ATTORNEY.

"153. Before the issue of a license to any such extra-provincial company the company shall file: (*a*) a true copy of the charter and regulations of the company; (d) a duly executed power of attorney under its common seal empowering some person therein named, and residing in the city or the place where the head office of the company in the province is situated, to act as its attorney and to sue and be sued, plead or be impleaded, in any Court, and generally on behalf of such company and within the province, to accept service of process and to receive all lawful notices, to issue and transfer shares of stock and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company to give its attorney."

On the 2nd April, 1921, assent was given to an Act of the British Columbia Legislature, entitled the Companies Act, 1921, which presumedly was intended to comply with the adverse criticism contained in the judgment of the *John Deere Plow Company Ltd.* v. *Wharton.*[9] It probably was drafted prior to the judgment in the *Great West Saddlery Company* v. *The King*[10] which was not pronounced until February 25th, 1921. By that Act the expression "extra-provincial" still retains its original interpretation of "a company incorporated or established outside the province." Part VIII. of the new Act deals with "extra-provincial companies." A distinction, however, is now made between companies which have a resident agent or representative or a warehouse or office in the province and companies which are not so equipped. Various obligations are imposed on companies of the former class, old section 152 which required a license to be obtained by the Dominion company disappears, but by section 142 all such companies must be registered nevertheless. By section 143, to obtain registration, these companies must file with the Registrar of joint stock companies a statement respecting the matters therein set out, including amongst other things the following: (a) Full particulars of the charter and regulations of the company; (k) full name, address and occupation of the person appointed as the attorney of the company as provided by section 151, and, (l) such other information as the Registrars may require.

New section 151 (1) provides that the company shall have an attorney in the province authorised by the company to accept service of process in all suits, etc., and on its behalf therein receive all lawful notices to the company. The Old section 153, above set out, was severely criticised during the argument of the John Deere Plow Company case. The following extracts from the notes of argument[11] should be read in determining whether the new sections retained any of the objectionable features of the old.

[9] (1915) A. C. 330.
[10] (1921) 2 A. C. 71.
[11] Registrar's Collection, pp. 24, 25.

"MR. WEGENAST: Now may I refer to section 153, which shows the character of the material which it is required a company shall file? Your Lordships will notice that the company must file a true copy of the charter and regulations of the company. Will your Lordships now turn to the definition of 'Charter and Regulations,' it may save some discussion later on, in section 2? You will find that the charter means 'the Act, Statute, Ordinance, or other provision of law'——

"LORD MOULTON: The formal document? MR. WEGENAST: Yes, but I should like your Lordships to notice the width of the requirement; I think it is not too much to say it is preposterous.

"LORD SUMNER: All contracts relating to the capital? MR. WEGENAST: Yes. 'Charter and regulations' of a company means the charter of the company and the articles of association, and all the by-laws, rules, and regulations of the company.' No broader language I think could be employed to bring in literally even the books of the company. Then, referring back to section 153, (d) refers to a power of attorney giving an attorney in the province powers which I may briefly say amount to the power to commit the company absolutely in any legal proceedings.

"LORD MOULTON: I think that is very important indeed (d). MR. WEGENAST: They must have an agent in the province who has absolute power to commit the company in any legal action. Then (e): 'Notice of the place where the head office without the province is situate.' (f): 'Notice of the city, town, district, or county in the province where the head office of the company is proposed to be situate.' That is, the company must establish a head office in the province. Then the amount of the capital of the company, and the number of shares. Then I should like to refer your Lordships to section 166 which imposes certain disabilities and penalties.

"LORD MOULTON: This man has power to issue and transfer shares of stock. MR. WEGENAST: The power is of the most far-reaching character one can imagine, but in the case of licensed companies at all events—and that is one of the small distinctions between licensed and registered companies—it must be in connection with legal proceedings. I think there cannot be read into the power of attorney which the department requires a power to commit the company to contracts, for instance, it is only when it has reached a stage of legal proceedings that the attorney's power becomes so broad.

"LORD SUMNER: For example, an action for specific performance could lie within the province, but if the judgment went against the company the attorney would have power under his power to transfer shares in execution of the judgment—something of that kind? MR. WEGENAST: This shows how very sweeping it is to attempt to regulate the companies, but it may be that it is within the powers. The point is, the obligation to take out a license, which may be refused, after all imposing stringent liabilities upon the company.

"THE LORD CHANCELLOR: To interfere with its capacity to trade?

"LORD MOULTON: Will you follow this? 'and generally on behalf of such company and within the province, to accept service of process and to receive all lawful notices, to issue and transfer shares of stock, and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company'—that is, I suppose, within the scope of the company 'to give to its attorney.'"

By the present Companies Act extra-provincial companies are required amongst other things to have by section 150 their names printed

or affixed to all bills, notes, cheques, orders for goods, invoices, receipts, etc.

By section 151 an attorney in the province authorised by the companies to accept process in all actions brought against them.

By section 153 such companies must file with the Registrar copies of all amendments to their charters or regulations within one month after the same takes effect.

By section 155 every such extra-provincial company shall keep at its head office in the province a register of its members in the province and enter therein all transfers of their stock, which register shall be open for inspection by the public.

By section 156 an annual report as to certain matters and generally, as to *any other* information the Registrar may require.

Penalties and Disabilities. The Dominion extra-provincial companies are excluded from the drastic provision of the former section 168, now 158, depriving them of the right to obtain redress through the Courts of law, but they are still liable for non-registration as follows: (a) a daily penalty of $20.00 to the company or its agent while unregistered (old sec. 167); (b) inability to hold lands (old sec. 169).

All other cases of non-compliance with the provisions of the Act have by section 267 affixed a penalty on the company or agent of $500. This would apply in the case of failure to give the additional information required by the Registrar under sections 143 and 156.

To conclude, it may be said that the materials required from Dominion companies by sections 150, 151, 155, 156 would appear to go beyond the limited information authorised by the language of the two decisions of the Judicial Committee we are now dealing with.

In the suggested amendment which follows, the scope of these provisions has been narrowed, while their substance has been preserved, except that it has not seemed wise to retain the requirements respecting the appointment of an attorney, although such a limited provision would be useful and not open to any serious objection except that it is an additional handicap upon outside companies. The cardinal feature of legitimate provincial legislation respecting Dominion companies would appear to be, that whatever might be a reasonable requirement to impose upon a local company carrying on the same business, could not be objected to if applied to a foreign one.

SUGGESTED AMENDMENT TO BRITISH COLUMBIA LEGISLATION.

His Majesty by and with the advice and consent of the Legislative Assembly of the Province of British Columbia enacts as follows:

"The 'Companies Act 1921' being chapter 10 of the Statutes of 1921 is amended as follows:

"In section 2 the expression "'*extra-provincial company*' means a company incorporated or established outside the province" is amended by adding thereto the words: 'except a Dominion company.'

This section is further amended by inserting after the expression "'*document*' includes summons, notice, order, certificate, register and legal process" the words

"'*Dominion company*' means any company incorporated by an Act of the Parliament of Canada.

"Section 143 of the said Act is amended by adding thereto: 143 (a) Every Dominion company shall within one month after it begins to carry on business in the Province of British Columbia file with the Registrar a statement according to Form 19 in the second schedule, so far as applicable.

"Section 156 of the said Act is amended by adding thereto 156 (2) Every Dominion company shall file with the Registrar not later than the first of March in every year a report according to Form 21 in the second schedule so far as applicable made up to the thirty-first day of December last preceding.

"Section 267 of the said Act is amended by adding thereto the following: 'Every Dominion company which makes default in complying with the requirements of this Act, and every director, manager, secretary or other officer of such Dominion company who knowingly and wilfully authorizes or permits of such default, shall be guilty of an offence against this Act and shall be liable on summary conviction to a penalty not exceeding five hundred dollars, but no prosecution in respect of such default shall be brought except with the written consent of the Attorney-General.'"

ALBERTA.

Shortly after the decision of the Judicial Committee of the Privy Council in the *John Deere Plow Co. Ltd.* v. *Wharton*[11] the Legislature of Alberta[12] amended its foreign companies ordinance so as to exclude from its operation Dominion companies. This amendment had amongst other things the effect of depriving the public from obtaining often very necessary information regarding the internal affairs of foreign companies which it is entitled to have according to the recent judgment in the case of the *Great West Saddlery Co.* v. *The King.*[1]

The following amendment to the present ordinance it is conceived is within the power of the Legislature and would obtain the desired information.

His Majesty by and with the advice and consent of the Legislative Assembly of the Province of Alberta enacts as follows:

1. The Foreign Companies Ordinance being chapter 14 of the Ordinances of 1903 (1st session) as amended by the Statute Law Amendment Act, 1915, is further amended as follows:

Section 2, sub-section 1 is amended by adding at the end thereof (a) the words "*Dominion Company*" means a company created by or under the authority vested in the Parliament of Canada by the British North America Act.

2. Section 8 is amended by adding thereto as sub-section 7 "Every Dominion company shall on or before the first day of March in each and every year after the date on which it began to carry on business in Alberta make and transmit to the Registrar a statement verified by affidavit containing as of the thirty-first day of December last preceding a summary of the particulars mentioned in paragraphs 1, 2 and 6 of this section and every Dominion company making a default in complying with this provision shall incur a penalty of twenty dollars for each and every day during which default continues, and every director, manager or secretary who shall knowingly and wilfully authorize or permit such default shall incur the like penalty, but such penalties shall be recoverable only by action at the suit of the Crown or of a private person on his own behalf with the written consent of the Attorney-General.

QUEBEC.

No dispute has arisen in the Province of Quebec respecting its legislative jurisdiction since the decision of *Bank of Toronto* v. *Lambe*,[2] where it was held that an extra-provincial bank was liable to direct taxation in the province.

[11] (1915) A. C. 330.
[12] Statute (1915) c. 2, s. 16.
[1] (1921) 2 A. C. 71.
[2] (1887) 12 A. C. 575.

There have been no difficulties respecting the registration of Dominion companies because Article 6098 of the R.S.Q. expressly excludes Dominion companies from the interpretation of the expression "extra-provincial companies."

NEW BRUNSWICK.

The Statute Chap. VII. of the Acts of 1915 provided for the imposition of certain taxes on foreign corporations and contained two sections, 21 and 23, which were so far only as Dominion companies were concerned, *ultra vires* by virtue of the decision in *John Deere Plow Company* v. *Wharton*. Thereupon in its next session the Legislature by Chapter 42 of the Statutes 6 Geo. V. (1916) repealed both of these sections.

In 1920 by 10 Geo. V. c. 51, the Act was again consolidated and section 11 contains provisions for the taxation of extra-provincial corporations of all kinds. The question of the validity of such discriminating legislation is discussed ante p. The repeal of 21 and 23 might have been limited to Dominion companies only. The Companies Act, Chap. 14 of the Statute of 1916, 6 Geo. V., could usefully be amended to provide, as has been done in other provinces, for the registration of Dominion companies for limited purposes such as information, etc. Some of the very elaborate provisions of Nova Scotia which follow might advantageously be adopted.

NOVA SCOTIA.

There has been no consolidation, though many amendments, to the Corporations Act of Nova Scotia since 1912. To obtain a clear view of the existing law of that province the writer has set out in the act which follows the original Act of 1912 as it now obtains with the various repeals and amendments. It will be found that the Act is not in any particular *ultra vires* if critically examined in the light of the recent decisions of the Privy Council.

1912 N. S. STATUTES. 2 GEO. V.

CHAPTER 15.

An Act to consolidate and amend Chapter 127, Revised Statutes, 1900, entitled, "Of General Provisions Respecting Domestic and Foreign Companies."

Be it enacted by the Governor, Council, and Assembly, as follows:

1. This Act may be cited as the Domestic, Dominion and Foreign Corporation Act, 1912.

2. This Act is divided into two parts.

Part I., relating to companies or corporations incorporated by or under the authority of an Act of the Legislature of Nova Scotia, except the Nova Scotia Joint Stock Companies' Act, and the Nova Scotia Companies' Act.

Part II., relating to corporations generally.

PART ONE.

3. The provisions of this part shall not apply to any company that is incorporated under the Nova Scotia Joint Stock Companies' Act, or under the Nova Scotia Companies' Act, but shall apply to every other company that is incorporated by or under the authority of an Act of the Legislature of Nova Scotia, unless the Act by or under the authority of which the company is incorporated contains other provisions in that behalf.

4. In this part, unless the context otherwise requires, the expression "company" means a company or corporation to which this part applies.

5. Every company shall be capable in its corporate name to sue and be sued, to prosecute and defend actions, to have a common seal which it may alter at pleasure, to elect in such manner as it deems proper all necessary officers, and to fix their compensation and define their duties, and to make by-laws and regulations, not contrary to law nor repugnant to the charter or Act by which the company is created, for its own government and the due management of its affairs.

(2) Every company that has been or may hereafter be incorporated shall, subject to the provisions of this Act and of the Act by or under which the company is incorporated, be capable—(a) of exercising outside of Nova Scotia all its functions as an incorporated company; and

(b) Of exercising all its functions as an incorporated company as if the Act by, or under which the company was incorporated, authorized the incorporation of the company by Letters Patent under the Great Seal of Nova Scotia granted by the Lieutenant-Governor in His Majesty's name and the company were so incorporated.

(3) Every company that was incorporated before the next preceding sub-section was enacted is declared to have been capable, subject to the provisions of this Act and of the Act by or under which the company is incorporated of exercising the functions mentioned in the said subsection.

6. Every company may, by its by-laws, determine the manner of calling and conducting meetings, the number of members which shall constitute a quorum, the number of shares which shall entitle the members to one or more votes, the mode of voting by proxy, the mode of selling shares for the non-payment of instalments and the transferring of shares generally, the tenure of office of the several officers, and the purchase, conveyance and sale of its real and personal property, and may annex penalties to its by-laws not exceeding in any case the sum of twenty dollars for any one offence.

7. The first meeting of every company shall be called by notice signed by any one or more of the persons named as corporators in the charter or Act of incorporation, and setting forth the time, place and purposes of the meeting, and such notice shall, seven days at least before the meeting, be delivered to each member, or left at his place of residence, or published in some newspaper of the county in which the company is established or proposed to be established, or where its principal place of business is situated or proposed to be situated, or if there is no newspaper in the county, then in two newspapers published in the City of Halifax.

8. Whenever by reason of the death, absence or disability of the officers of any company there is no person authorized to call or preside at a meeting of the members thereof, and three or more of the members may call such meeting by giving the notice as required by law.

9. The members when so assembled may choose a chairman, and may elect officers to fill all vacancies then existing, and may transact such other business as might by law be transacted at a regular meeting of the company.

10. The shares or stock of every company shall be deemed to be personal property for all purposes.

11. Every charter or Act of incorporation shall expire unless the company thereby incorporated goes into operation within three years from the passing thereof.

12. Every company, the charter or Act of incorporation of which, after such company has gone into operation, expires or is annulled by forfeiture or otherwise, shall nevertheless be continued as a body corporate for the term of three years after the time when such charter or

Act of incorporation has so expired or been annulled, for the purpose of prosecuting and defending actions by or against it, and of enabling it to settle and close its business, to dispose of its property, and to divide its capital stock; but not for the purpose of continuing the business for which such company was established.

13. When the charter of any company so expires or is annulled, the Supreme Court, on application of any creditor of such company or of any member thereof, at any time within the three years, may appoint a trustee or trustees to take charge of the estate and effects of the company and to collect the debts and property due and belonging thereto, with power to prosecute and defend actions in the name of the company, to appoint agents and to do all other acts which might be done by such company that are necessary for the final settlement of the unfinished business of the company; and the power of such trustees may be continued beyond the three years if the Court thinks necessary.

14. No member of any company shall be relieved from individual liability for its debts or obligations, but each member thereof shall be liable as a partner to the same extent as if no company existed; and in case any execution issued on any judgment against the company is returned unsatisfied, the individual and real personal property of every member of the company shall be liable to respond to such judgment under execution issued thereon in the same manner as if the same was a private debt due by such member, unless the Act by or under the authority of which the company was incorporated exempts its members from such liability; and any member who is compelled to pay any moneys on account of the debts of the company may recover the same by action against the company.

15. The directors or board of managers of any company, the liability of whose members is limited by the charter or Act of incorporation, shall in all cases be personally liable for any debt incurred by them on account of the company beyond the amount of the stock subscribed without the sanction of the company obtained at a meeting thereof held in accordance with the by-laws, but this section shall not extend to insurance companies.

16. The acts of any company performed within the scope of its charter or Act of incorporation shall be valid, notwithstanding they are not done under or authenticated by the seal of such company.

17. Whenever by any charter or Act of incorporation it is provided that any dispute or matter of controversy in which the company is interested or any damages to which it is liable shall be settled or ascertained by arbitration, such provisions shall be deemed a " submission to arbitration " within the meaning of that expression on " The Arbitration Act."

18. No company shall be bound to see the execution of any trust, whether express, implied or constructive, in respect of any of its shares, and the receipt of a shareholder in whose name the same stands on the books of the company shall be a valid and binding discharge to the company for any dividend or money payable in respect of such share, whether or not notice of the trust has been given to the company, and the company shall not be bound to see to the application of the money paid on such receipt, 1903, c. 17.

19. (1) It shall be lawful for any company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or for procuring or agreeing to procure subscriptions for any shares in the company, if such commission paid or agreed to be paid does not exceed ten per cent. of the price at which such shares are sold.

(2) Save as aforesaid, no company shall apply any of its shares or capital money, either directly or indirectly, in payment of any commission, discounts or allowances to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolutely or conditionally, for any shares of the company, whether the shares or moneys be so applied by being added to the purchase money of any property acquired by the company, or to the contract price of any work to be executed for the company, or the money being paid out of a nominal purchase money or contract price or otherwise.

19. (a) Every company shall have its head office or seat in Nova Scotia.

PART TWO.

20. In this part, unless the context otherwise requires,

(a) the expression " Domestic Corporation " means a body corporate that is incorporated by or under the authority of an Act of the Legislature of Nova Scotia, and has gain for its purpose or object;

(b) the expression " Dominion Corporation " means a body corporate that is incorporated by or under the authority of an Act of the Parliament of Canada, and has gain for its purpose or object;

(c) the expression " Foreign Corporation " means a body corporate that is incorporated otherwise than by or under the authority of an Act of the Legislature of Nova Scotia or of the Parliament of Canada, and has gain for its purpose or object;

(d) the expression " Corporation " means a body corporate that is a domestic corporation or a Dominion corporation or a foreign corporation as hereinafter defined;

(e) the expression " Registrar " means the Registrar of joint stock companies.

21. Any corporation whether incorporated before or on the 1st day of October, A. D. 1912, or at any time thereafter, may have a certificate (in this part called a Certificate of Registration) issued to it by the Registrar as hereinafter provided.

22. The Registrar shall, unless it is otherwise provided in this part, issue a certificate of registration,—

(a) to any Dominion corporation and to any foreign corporation that files with the Registrar a statement as required by section 24 of this Act:

(b) to any domestic corporation that applies therefor.

The certificate of registraation shall state that the corporation is registered under Part II. of this Act, and shall be under the hand of the Registrar.

There shall be paid to the Registrar for the certificate of registration a fee, the amount of which shall be determined in the same way as that hereinafter provided in respect to annual registration fees, but deducting therefrom a due proportionate part thereof for every full calendar month that may have elapsed between the date of the registration and the first day of the next preceding month of January.

23. If any corporation holding a certificate of registration fails to comply with any of the requirements of this part, or if it requests that its certificate of registration be revoked, the Registrar may revoke its certificate of registration and shall then cause notice of such revocation to be published in the " Royal Gazette." (Where a certificate of registration is so revoked the Registrar may withhold the issue of another certificate of registration in respect to such corporation until it complies with all or any of the requirements of this part in respect to which it is in default, and until it pays to the Registrar for such certificate of registra-

tion a fee, the amount of which shall be determined in the same way as that hereinafter provided in respect to annual registration fees.

24. Every Dominion corporation and every foreign corporation shall, before a certificate of registration is issued to it, file with the Registrar a statement verified under oath by one of its principal officers showing:

(a) its corporate name;

(b) when, and where and under what special or general Act it was incorporated;

(c) where its head office is situated;

(d) the amount of its nominal capital stock;

(e) the amount of its capital stock subscribed or issued and the amount paid up thereon and the amount of its rest or reserve funds and the like;

(f) the nature of each kind of business it is empowered to carry on, and what kind or kinds of business is or are intended to be carried on in Nova Scotia; or, in the case of a Dominion corporation, when it has commenced to carry on business in Nova Scotia;

(g) the names of its directors and officers.

25. (1) Every corporation holding a certificate of registration shall appoint and have a recognized agent resident within the province, service upon whom of any writ, summons, process, notice or other document which shall be deemed to be sufficient service upon the corporation. If any corporation fails to appoint and have such agent it shall be liable to a penalty not exceeding one hundred dollars.

(2) A statement showing the name and address of such agent and from time to time a statement showing any change of such agent or of his address, shall be filed with the Registrar. Until such statement is so filed a corporation shall be deemed not to have complied with the provisions of this section with respect to appointing and having such agent.

(3) If a corporation has no such agent or he cannot be found or he is absent, any writ, summons, process, notice or other document may be served on any officer or on any employee of the corporation, or in case there is no such officer nor employee or he cannot be found or he is absent, may be posted in a conspicuous place on any land or building owned or occupied by the corporation, and such service or posting shall be deemed to be sufficient service upon the corporation.

(4) If before this Act comes into force any corporation has filed in the office of the Provincial Secretary a statement similar to that first referred to in this section and in accordance with chapter 127 Revised Statutes, 1900, such corporation shall not be required to file the said statement first referred to in this section, unless or until the agent mentioned in such statement has ceased to be such agent of the corporation, or his address has changed.

26. (1) Every corporation holding a certificate of registration shall, in the month of January, in each year, file with the Registrar a statement verified under oath by its recognized agent resident within the province, showing the names of its directors and of its officers, the amount of its nominal capital stock, the amount of stock subscribed or issued and the amount paid up thereon, the amount of its rest or reserve fund and the like, and such other information as the Registrar requires.

(2) If a corporation makes default in complying with the provisions of this section, the corporation shall be liable to a penalty of $10 for every day during which the default continues, and every director, manager, secretary or agent of the corporation who wilfully authorizes or permits such default, shall be liable to a like penalty.

27. Every corporation holding a certificate of registration shall file a statement with the Registrar, whenever a written request shall be by him made therefor, showing,—

(a) the names, addresses and occupations of all persons who are

shareholders of the corporation and the number of shares held by each of them;

(b) the amount of the capital of the corporation and the number of shares into which it is divided;

(c) the number of shares taken from the commencement of the corporation up to the date of the statement;

(d) the amount of calls made on each share;

(e) the total amount of calls received;

(f) the total amount of calls unpaid;

(g) the total number of shares forfeited;

(h) the names, addresses and occupations of the persons who have ceased to be shareholders within twevle months next preceding the date of such statement, and the number of shares held by each of them;

(i) such other information as the Registrar requires;

Such statement shall be verified under oath by one of the principal officers of the corporation and shall be filed as aforesaid within one month from the date of such written request.

28. Every corporation holding a certificate of registration shall, in the month of January in each year, pay to the Registrar a fee (in this part called an annual registration fee) as follows:

In the case of a Domestic Corporation or of a Dominion Corporation:

Having a nominal capital not exceeding $5,000, a fee of $10.00.

Having a nominal capital not exceeding $10,000, a fee of $20.00.

Having a nominal capital not exceeding $25,000, a fee of $30.00.

Having a nominal capital not exceeding $50,000, a fee of $50.00.

Having a nominal capital not exceeding $75,000, a fee of $75.00

Having a nominal capital not exceeding $100,000, a fee of $100.00.

Having a nominal capital not exceeding $250,000, a fee of $125.00.

Having a nominal capital not exceeding $500,000, a fee of $150.00.

Having a nominal capital not exceeding $1,000,000, a fee of $200.00.

Having a nominal capital exceeding $1,000,000, a fee of $200.00, and ten cents for every $1,000 of its nominal capital over $1,000,000.

In the case of a Foreign Corporation:

Having a nominal capital not exceeding $10,000, a fee of $50.00.

Having a nominal capital not exceeding $50,000, a fee of $100.00.

Having a nominal capital not exceeding $100,000, a fee of $150.00.

Having a nominal capital exceeding $500,000, a fee of $200.00, and ten cents for every $1,000 of its nominal capital over $500,000.

For the purpose of this section, the amount of the nominal capital of a corporation, the shares of which are issued without any nominal or par value, shall be deemed to be $100 each per share.

Provided, however, that with respect to a Dominion corporation or to a foreign corporation having a nominal capital exceeding $1,000,000 and carrying on business in Nova Scotia heretofore, and carrying on also an established business outside of Nova Scotia in which at least fifty per cent. of its subscribed capital is invested, the Governor-in-Council may reduce the annual registration fee payable under this section to such a sum as he may think just, having regard to the nature and importance of its business in Nova Scotia and the amount of capital used therein; provided also that with respect to such corporation not carrying on business in Nova Scotia heretofore when applying for registration under this Act the Governor-in-Council may reduce the annual registration fee to such sum as he may think just, having regard to the nature and importance of the business proposed to be carried on in Nova Scotia and the amount of capital proposed to be used therein. A corporation seeking a reduction of the fee under this section shall give to the Registrar such statement and information respecting its business and financial position as he may call for and shall verify the same in such manner as he may require. But in no case shall

the annual registration fee from such a corporation seeking a reduction hereunder be less than the sum of $200.00 in the case of a Dominion corporation, or $250.00 in the case of a foreign corporation.

If any such corporation makes default in paying any nominal registration fee, that is due and payable by it as aforesaid, such corporation shall be liable to a penalty of double the amount of the annual registration fee.

Every corporation shall pay in addition the following fees:

For filing appointment of agent or change of same, $2.00.

For filing document or notice other than the annual statement, $2.00.

For registering a change in name of a Dominion or foreign corporation, $10.00.

This section shall not apply to any corporation that is incorporated under chapter 132, Revised Statutes, 1900, " of Cemetry Companies " or under chapter 33, Revised Statutes, 1900, " of Fishermen's Bait Associations " or under chapter 30 of the Acts of 1903, " An Act to Incorporate Associations for the Construction of Mechanical Bait Freezers," or under chapter 39 of the Acts of 1905, " An Act to provide for the Organisation of Fishermen's Unions," or under chapter 2 of the Acts of 1913, "An Act Respecting Rural Telephone Companies," or under chapter 4 of the Acts of 1919, "An Act to Provide for the Erection of Dwelling Houses and for the Incorporation of Housing Companies."

29. If any corporation, whether incorporated before or on the 1st day of October, A.D. 1912, or at any time thereafter, does or carries on in Nova Scotia any part of its business whilst it does not hold a certificate of registration that is in force, such a corporation shall be liable to a penalty of $10.00 for every day on which it so does or carries on any part of its business, and every director, manager, secretary, agent, traveller or salesman of such corporation who, with notice that such corporation does not hold a certificate of registration that is in force transacts in Nova Scotia any part of the business of such corporation, shall, for every day on which he so transacts the same, be liable to a penalty of ten dollars; provided that this section shall not apply to a Dominion corporation until the expiration of one month after its commencing to carry on business in Nova Scotia.

31. (1) It shall not be deemed a doing or carrying on of business or any part thereof within the meaning of this part, if a corporation merely takes orders for or buys or sells goods, wares or merchandise by travellers or by correspondence, but has no traveller, agent or representative resident in Nova Scotia or no office or warehouse or place of business in Nova Scotia.

(2) The onus of proving that a corporation has no such traveller, agent or representative resident in Nova Scotia, and no office or warehouse or place of business in Nova Scotia, and has not done or carried on in Nova Scotia any part of its business within the meaning of this part, and has not gain for its purpose or object, and holds a certificate of registration that is in force, shall in any prosecution or other proceeding for an offence against this Act be upon the defendant.

32. The books and accounts of every corporation holding a certificate of registration shall at all times be open to the inspection of the Registrar or of such person as he appoints to inspect the same.

33. (1) The penalties imposed by this Act shall be recoverable only by action at the suit of or brought with the written consent of the Attorney-General of Nova Scotia or upon summary conviction with the like consent.

(2) The Registrar may, with the approval of the Provincial Treasurer, either before or after the institution of proceedings against any company under the provisions of this Act for enforcing payment of any fee or any pecuinary penalty, accept from the company the payment of a

sum not less than the amount of the fee with interest or a sum not less than the minimum nor more than the maximum pecuniary penalty prescribed, as the case may be, and such payment shall be a full satisfaction, release and discharge of such fee or penalty.

34. All fees paid to the Registrar in pursuance of this part shall form part of the general revenue of the province.

35. The Acts and parts of Acts mentioned in the Schedule to this Act are repealed to the extent in the Schedule specified.

36. This Act shall not come into force until the first day of October, A.D. 1912.

SCHEDULE.

Acts Repealed.	Extent of Repeal.
Revised Statutes, 1900, Cap. 127	The Whole Act.
Acts of 1903, Cap. 16	The Whole Act.
Acts of 1903, Cap. 17	The Whole Act.
Acts of 1903-1904, Cap. 24	The Whole Act.
Acts of 1908, Cap. 30	The Whole Act.

(1921) A. C. 91.

PRIVY COUNCIL APPEAL NO. 191 OF 1919.

The Great West Saddlery Company, Limited - - - *Appellants.*

v.

The King - - - - - - - - - *Respondent.*

AND

The Attorney-General of Canada - - - - - *Intervener.*
The John Deere Plow Company, Limited - - - - *Appellants.*

v.

The King - - - - - - - - - *Respondent.*

AND

The Attorney-General of Canada - - - - - *Intervener.*
The A. Macdonald Company, Limited - - - - *Appellants.*

v.

Daniel Whitfield Harmer - - - - - - - *Respondent.*

AND

The Attorney-General of Canada and another - - - *Interveners.*
The Great West Saddlery Company, Limited - - - *Appellants.*
George Davidson - - - - - - - - *Respondent.*

AND

The Attorney-General of Canada and others - - - *Interveners.*

FROM

THE SUPREME COURT OF CANADA.

The Harris Lithographing Company, Limited - - - *Appellants.*

v.

Horace B. Currie - - - - - - - - *Respondent.*

AND

The Attorney-General of Canada - - - - - *Intervener.*
Same - - - - - - - - *Appellants.*
The Attorney-General of Ontario - - - - - *Respondent.*

AND

The Attorney-General of Canada - - - - - *Intervener.*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

(*Consolidated Appeals.*)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH *FEBRUARY*, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD SUMNER.
LORD PARMOOR.
(*Delivered by* VISCOUNT HALDANE.)

In this case their Lordships are called on to interpret and apply the implications of a judgment, delivered by the Judicial Committee on the 2nd November, 1914, in *John Deere Plow Company* v. *Wharton,* and reported in 1915 A.C. 330. It was then laid down that the British North America Act of 1867 had so enabled the Parliament of the Dominion to prescribe the extent of the powers of companies incorporated under Dominion law with objects which extended to the Dominion generally, that the status and powers so far as there in question of one of the three Appellant Companies could not as matter of principle be validly interfered with by the provincial legislature of British Columbia.

It was held that laws which had been passed by the legislature of that province, and which sought to compel a Dominion company to obtain a certain kind of provincial license or to be registered in the way brought before the Judicial Committee, as a condition of exercising its powers in the province or of suing in its Courts, were *ultra vires.* The reason given was that their Lordships interpreted what had been done by the province in that case as interfering in a manner not consistent with the principles laid down with the status and corporate capacity of a company with Dominion objects to which the Parliament of Canada had given powers to carry on its business in every part of the Dominion.

In the consolidated appeals now before their Lordships analogous questions are raised by legislation in varying forms enacted in three other provinces, Saskatchewan, Manitoba, and Ontario.

Since the decision in 1914 the Province of Saskatchewan has passed an Act, in 1915, which supersedes its earlier Companies Acts, and apparently seeks to avoid the features in these which might conflict with the decision of this Committee in the John Deere Plow case as to the British Columbia legislation. The question raised as regards Manitoba arises out of older legislation of 1913 (subsequently amended and re-enacted in 1916), and as regards Ontario under an older Ontario Companies Act and the Extra-Provincial Corporation Act of 1914. No question is raised from British Columbia, or from any province other than Saskatchewan, Manitoba and Ontario, on this occasion.

The proceedings out of which the present appeals arise concern several Dominion companies, and are, as to Saskatchewan, two cases before a magistrate for infraction of the provisions of the Provincial Companies Act, and an action by a shareholder in one of the Dominion companies concerned, to restrain it from attempting to carry on its business without complying with the requirements of the Companies Act of the province. The main issue in all these proceedings is substantially the same.

In Manitoba an analogous question was raised in a shareholder's action, and also in an action by the Attorney-General of the province.

The main issue in Ontario was similar to that in Saskatchewan, but there was also raised a question as to whether a Dominion company could hold land in the province without being authorized to do so by its Government, in accordance with Ontario statute law.

In the proceedings referred to judgments were delivered in the Courts of first instance and by the Appellate Courts in Saskatchewan and Manitoba, and by the Courts of first instance and the Appellate Court in Ontario. In the cases in the two former provinces there was an appeal to the Supreme Court of Canada, but in the Ontario litigation the appeal has been brought directly to the King in Council from the judgment of the Appellate Court of the province.

On the 18th August, 1919, special leave to appeal to the Privy Council was granted, and it was ordered that the appeals, six in number, from judgments which had been adverse to the Dominion companies concerned, should be consolidated and heard together.

It will be convenient, having regard to the course taken in the argument, to consider in the first place the appeal from the Court of Appeal in Ontario.

The Attorneys-General for Canada and for the provinces have intervened throughout.

In order to ascertain the real points now in controversy, it is important to refer in some detail to what was actually decided in 1914 in the original case of the John Deere Plow Company.

The British Columbia Companies Act had provided that, in the case of an incorporated company which was not one incorporated under the laws of the province, and was called in the Act an extra-provincial company, certain conditions must be complied with. If such a company had gain for its object it must be licensed or registered under the law of the province, and no agent was to carry on its business until this had been done. If this condition were complied with, such an extra-provincial company might sue in the courts of the province and hold land there. Such a company might also, if it were one duly incorporated under the laws of, among other authorities, the Dominion, and if authorized by its charter to carry out purposes to which the legislative authority of the province extended, obtain from the Registrar under the general Companies Act of the province, a license to carry on business within the province on complying with the provisions of the Act and paying a proper license fee. It was then to have the same powers and privileges in the province as though incorporated under the provincial Act. If such a company carried on business without a license it was made liable to penalties, and its agents were similarly made liable. So long as unlicensed, the company could not sue in the Courts of the province in respect of contracts in connection with its business made within the province. The Registrar might refuse a license where the name of the company was identical with or resembled that by which a company, society or firm in existence was carrying on business or had been incorporated, licensed or registered, or where the Registrar was of opinion that the name was calculated to deceive, or disapproved of it for any other reason.

Their Lordships pointed out that, under the Dominion Companies Act, which they held to have been validly passed, the charter of the John Deere Plow Company incorporated it with the powers to which the legislative authority of the Parliament of Canada extended. The Dominion Interpretation Act provided that the meaning of such an incorporation included this, that the corporate body created should have power to sue, to contract in its corporate name, and to acquire and hold personal property for its purposes. There was in the Dominion Companies Act a provision that such a company should not be incorporated with a name likely to be confounded with the name of any other known company, incorporated or unincorporated, and it gave the Secretary of State the discretion in this connection. On incorporation the company was to be vested with all the powers, privileges, and immunities, requisite or incidental to the carrying on of its undertaking. It was to have an office in the city or town in which its chief place of business in Canada was situated, which should be its legal domicile in Canada, and could establish other offices and agencies elsewhere. No person acting as its agent was to be subjected, if acting within his authority, to individual penalty.

Their Lordships made reference to the circumstances that the concluding words of section 91 of the British North America Act, "Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," render it necessary to do more than ascertain whether the subject matter in question apparently falls within any of the heads of section 92; for if it also falls within any of the enumerated heads of section 91, then it cannot be treated as covered by any of those in section 92. As is now well settled, the words quoted apply, not only to the merely local or private matters in the province referred to in the 16th head of section 92, but to the whole of the sixteen heads in that

section (*Attorney-General for Ontario* v. *Attorney-General for the Dominion,* 1896, A.C. 348). The effect, as was pointed out in the decision just cited, is to effect a derogation from what might otherwise have been literally the authority of the provincial legislatures, to the extent of enabling the Parliament of Canada to deal with matters local and private where, though only where, such legislation is necessarily incidental to the exercise of the enumerated powers conferred on it by section 91.

If therefore in legislating for the incorporation of companies under Dominion law and in validity endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the provinces, they cannot be interfered with by any provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction to prevent them from exercising the powers conferred on them by Dominion law. Their Lordships, however, observed that when a company has been incorporated by the Dominion Government with powers to trade in any province, it may not the less, consistently with the general scheme, be subject to provincial laws of general application, such as laws imposing taxes, or relating to mortmain, or even requiring licenses for certain purposes, or as to the forms of contracts; but they were careful not to say that the sanctions by which such provincial laws might be enforced could validly be so directed by the provincial legislatures as indirectly to sterilize or even to effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred. To have said so would have been to misread the scheme of the British North America Act, which is one that establishes interlacing and independent legislative authorities. Within the spheres allotted to them by the Act the Dominion and the provinces are rendered on general principle co-ordinate Governments. As a consequence, where one has legislative power the other has not, speaking broadly, the capacity to pass laws which will interfere with its exercise. What cannot be done directly cannot be done indirectly. This is a principle which has to be kept closely in view in testing the validity of the provincial legislation under consideration as affecting Dominion companies.

Their Lordships will not repeat what was laid down in the judgment delivered in the John Deere Plow case as to the other aspects of the general question there under consideration, but will proceed, in the light of what has just been said, to the consideration of the validity of the Ontario legislation under review.

The general Companies Act of Ontario was passed before the decision on the John Deere Plow case, and has no special bearing on the question in this appeal. The important statute is the Extra-Provincial Corporations Act, which was also passed before that decision.

The purpose of the latter statute is to provide that certain classes of extra-provincial corporations (which means corporations created otherwise than by or under the authority of an Act of the Ontario Legislature), including those created under any Act of the Dominion and authorized to carry on business in Ontario, must take out a license (section 4) under the Ontario Statute. On complying with its provisions a corporation coming within these classes is entitled to receive a license (section 5) to carry on its business and exercise its powers within Ontario. In the absence of such a license it is forbidden to do so (section 7), and its agents are subjected to a like prohibition. A penalty of $20 a day is imposed for any contravention of this provision. An extra-provincial corporation coming within the classes referred to may apply to the Lieutenant-Governor-in-Council for a license to carry on its business and exercise its powers in Ontario, and no limitations or conditions are to be included in any such license which would interfere with the rights of such a corporation, for example, a Dominion company, to carry on in Ontario all such part of its powers as by its Act or charter of incorporation it may be authorized to carry on and exercise there (section 9 (1 and 2)). A corporation receiving a license may, subject to the limitations and conditions of the license, and the provisions of its own constitution, hold and dispose of real estate in Ontario, just as an Ontario company might (section 12). A corporation receiving a license may be called on to make returns comprising such information as is required from an Ontario company (section 14). The Lieutenant-Governor-in-Council may

make regulations for, among other things, the appointment and continuance by the extra-provincial company of a representative in Ontario on whom service of process and notices may be made (section 10 1*b*)). If such a company, having received a license, makes default in complying with the limitations and conditions of the license or of the provision as to returns, or of the regulations respecting the appointment of a representative, its license may be revoked (section 15). If such a corporation carries on in Ontario without a license any part of its business, it is to incur a penalty of $50 a day, and is rendered incapable of suing in the Ontario courts in respect of any contract made in whole or in part within Ontario in relation to business for which it ought to have been licensed (section 16). The Lieutenant-Governor-in-Council may prescribe fees on the transmission of the statement or return required under section 14. Such fees are to vary with the capital stock of the company (section 20).

It is obvious that the Act thus summarized assumes that the legislature of the province can impose on a Dominion company conditions which, if not complied with, will restrict the exercise of its powers within the province. These conditions do not appear to their Lordships to be merely a means for the attainment of some exclusively provincial object, such as direct taxation for provincial purposes. They apparently assume a general right to limit the exercise of the powers of extra-provincial companies if they seek to exercise these powers within Ontario. A question of principle is thus raised broadly, and their Lordships now turn to the judgments in the Courts of Ontario in which it has been dealt with. In these Courts over this question there has been divergence of judicial opinion, and the question itself has been considered there with such thoroughness and ability that it is proper to refer to the diverging reasoning in some detail.

Masten, J., before whom the cases came in the first instance, was of opinion that in passing the Extra-Provincial Corporations Act the legislature of Ontario had exceeded its powers. He pointed out that the Dominion Companies Act had vested in the companies incorporated under its provisions all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking, and that, in view of the decision in the John Deere Plow appeal, the power conferred on the Parliament of Canada to regulate trade and commerce, and to that extent to prescribe these capacities in cases affecting the Dominion at large, must be taken to be paramount and overriding. He thought that section 7 of the Extra-Provincial Corporations Act afforded the keynote and the "pith and substance" of that Act, the purpose of which, as applied to Dominion companies, was to preclude them from the exercise of some of their powers and to deprive them of their status in Ontario unless a license were obtained and certain fees paid there. However simple and little oppressive such a process might be it constituted none the less a direct interference. It had been attempted to support this interference as justified by the powers conferred by section 92 on the provinces to raise revenue by direct taxation, to deal with property and civil rights, particularly from the point of view of mortmain, to legislate for the administration of justice, and to impose penalties in furtherance of these ends. But in the opinion of the learned Judge these aspects of what had been included in the Provincial Statute, except in the case of the mortmain law, had been introduced into it in reality only as ancillary to section 7, and to the main purpose of asserting a direct control over the Dominion companies before permitting them to carry on their business in the province. This purpose so permeated the whole Act that it was not practicable to hold certain of its sections valid and others invalid. The provision of section 9(2) which excluded from any license to be required limitations or conditions restricting the rights of the company to carry on in Ontario all such parts of its business and powers as by its Act or Charter of incorporation it might be authorized to exercise there, did not mend matters. But the provisions of the Ontario Mortmain Act stood on a different footing. For the incapacity to hold lands did not arise because of the application of the Extra-Provincial Corporations Act, but because of the general scope of the Mortmain Act, itself a separate statute which the learned Judge seemingly regarded as within the powers of the Province.

In the Supreme Court of Ontario, which heard the appeal from this decision, and from which an appeal has been brought directly to the Sovereign in Council,

opinion was divided. The case was argued before five Judges, the Chief Justice of Ontario, MacLaren, J.A., Magee, J.A., Hodgins, J.A., and Ferguson, J.A. By a majority of four to one, Ferguson, J.A., dissenting, the judgment of Masten, J., was reversed. It was declared that the Extra-Provincial Corporations Act was *intra vires,* excepting as to the words of section 16(1) to the effect that the Dominion companies could not sue unless they had obtained provincial licenses. In agreement with Masten, J., the Court of Appeal held that the companies were bound to comply with the provisions of the Ontario Mortmain Act as a condition of occupying and holding lands in the province.

Chief Justice Meredith made an able and exhaustive scrutiny of the legislation. He observed that it was well settled that, notwithstanding the Dominion having conferred on a company of its creation rights and powers, that company was subject to and bound to obey the laws of the province with regard to taxation for provincial purposes; with regard also to contracts made within the province, and as to the holding and tenure of land; and that the exercise by the province of its authority to pass such laws necessarily limits or restricts the power granted to the company by the Dominion. He then summarized the judgment of this Committee in the John Deere Plow appeal, and stated one of its results as having been that as the provisions of the British Columbia Statute there in question sought to compel the John Deere Plow Company to obtain a license or to be registered in that province, as a condition of exercising its power of suing in the Court of the province, these provisions were *ultra vires.*

The learned Chief Justice went on to interpret the reasons assigned by this Committee for their judgment. (1) Notwithstanding the generality of the expression in section 92 of the British North America Act, the words "civil rights" must be regarded as not covering cases expressly dealt with in section 91 or even in section 92 itself. (2) Notwithstanding that a company has been incorporated by the Dominion with power to trade, it is not the less subject to provincial laws of general application enacted under section 92, including laws as to mortmain and payment of taxes, even though in the latter case the form assumed is that of requiring a license to trade affecting Dominion companies in common with other companies, and including laws as to contracts. (3) It might be competent for a Provincial Legislature to pass laws relating to companies without distinction, requiring those not incorporated within the province to register for limited purposes, such as the furnishing of information or, under a general Statute as to procedure, the giving security for costs. Chief Justice Meredith thought that the key to the decision was that the Judicial Committee were of opinion that the provisions of the British Columbia Act were not of these characters, but were directed to interfering with the status of Dominion companies and to preventing them from exercising the powers conferred on them by the Parliament of Canada. He referred to various earlier decisions of this Committee, and came to the conclusion that what was intended in the John Deere Plow case was to lay down that it was not competent for a Provincial Legislature to single out Dominion corporations and to subject them to laws which were not applicable to all corporations. An important circumstance in that case was, he thought, that the Registrar had asserted power to refuse a license unless the name were changed, an interference with the status of the company. As to this circumstance, he drew attention to what he regarded as an important difference between the British Columbia and the Ontario Legislation. In the latter section 9(2) precluded the insertion in the license of any limitation or condition which would limit the rights of a corporation to carry on in Ontario such parts of the business and powers as by its Act or charter of incorporation had been authorized. The Chief Justice notices in passing that, by section 15 of the Extra-Provincial Corporations Act, if a corporation receiving a license makes default in observing or complying with its conditions or the provisions of section 14 as to returns, or any regulations respecting the appointment of a representative in the province, the license may be revoked. He thinks that since the amendment made in the original form of the Act, which is embodied in section 9(2) just referred to, the words have now no meaning, and would have been eliminated but for the oversight of the draftsman. In his dissenting judgment, however, Ferguson, J.A., takes the view that, even if the new section was meant to resist the purpose of

the Act, the words of section 9(2) do not do so sufficiently to alter that purpose as remaining.

The Chief Justice was of opinion that section 16, which imposes a penalty on the Extra-Provincial company for every day upon which it carries on its business without being licensed, was *ultra vires,* and in this the other members of the Court appear to have agreed with him. Subject to this exception he thought that the provisions of the enactment in question were of the character of " provincial laws of general application," within the meaning of the decision in the John Deere Plow case. What was important was not the form, which need not be uniform. In substance, what was done was to impose a tax which was really lighter than that imposed on provincial companies. The other provisions of the Act were ancillary to this taxation, and it was no valid objection to what was done that, to the extent required for the exercise of powers specifically entrusted to the Provincial Legislatures, it, in a sense, restricted the exercise of powers conferred by Dominion authority. All laws imposing the necessity of obtaining licenses and paying taxes, and of conforming to mortmain requirements, must do so. In the opinion of the Chief Justice the Act was not, in pith and substance one designed to restrict Dominion companies "in the exercise of the powers conferred on them by the Dominion authority, but an Act lawfully passed for purposes as to which the legislature by which it was enacted had authority to legislate." As to the Mortmain Act, he agreed with Masten, J., that the law was one of general application and was binding on all companies which it purported to include.

MacLaren, J.A., Magee, J.A., and Hodgins, J.A., agreed in substance with the above conclusions.

Ferguson, J.A., in effect agreed with the reasoning of Masten, J. He was of opinion that the Act as originally enacted was passed on the assumption that it was within the legislative authority of the province to control all extra-provincial corporations, and that, notwithstanding that in its existing form amendments had been incorporated into the Act designed to mitigate this, the Act still embodied the object of general control. This was shown by the power, given by section 11 and by the regulations, which purported to enable the Lieutenant-Governor-in-Council to refuse a license if the name of the company was objectionable in any of various respects.

Their Lordships defer making any observations on these judgments until they have dealt with the other cases. They only observe that with certain of the general propositions expressed by Meredith, C.J., in his judgment they are in substantial agreement.

Their Lordships turn next to the case which has been brought forward as regards the legislation on the subject in Manitoba. In the Courts of that province analogous questions were raised in a shareholder's action. The Attorney-General of the province intervened in the course of the subsequent appeal.

In Manitoba there was passed in 1913 a general Companies Act, of which Part IV. deals with extra-provincial companies and includes Dominion corporations. Under section 108 every such corporation is required to take out a license under this part of the Act, and by section 109 *inter alia* such a corporation on complying with the provisions of that part and with the regulations made under the Act, is entitled to receive a license to carry on its business and exercise its powers in Manitoba. By section 111 (*inter alia*) such a corporation may apply to the Lieutenant-Governor-in-Council " for a license to carry on its business or part thereof, and exercise its powers or part thereof, in Manitoba, and upon the granting of such license such corporation may thereafter, while such license is in force, carry on in Manitoba the whole or such parts of its business and exercise in Manitoba the whole or such parts of its powers as may be embraced in the license; subject, however, to the provisions of this part and to such limitations and conditions as may be specified in the license." On such an application the corporation is to file certain evidence and a power of attorney to someone in the province appointing him to accept service. This is not to apply if the head office is within the province (section 114(3)). By section 118 no such corporation is to carry on within Manitoba any of its business, and no agent is to act for it, until a license has been granted to it, and then only so long as this is in force. Section 120 requires annual returns of

information to be made. By section 121 the Lieutenant-Governor-in-Council may suspend or revoke the license for default in observing the provisions of the Act. Section 122 provides, as in the case of the Ontario Statute, for penalties for the carrying on of business in the absence of the license, and incapacitates the corporation from suing without it in the Courts of the province. Section 126 enables the Lieutenant-Governor to fix the fees to be paid. These are for the exchequer of the province, and are to vary in part according to the nature and importance of the business to be carried on in the province, and in part according to the amount of the entire capital stock of the corporation. In addition to these provisions, section 112 enables a duly licensed corporation to hold real estate in the province, but limited, in its license, by section 113, to such annual value as may have been deemed proper, as fully as if it had been a Manitoba company under the general Act. There is no Mortmain Act in the province, but the registration of titles to land requires a license and the registration of title to real estate in the case of extra-provincial companies.

Thus there does not appear to be anything in the form or substance of the Manitoba Act which differentiates it materially from the corresponding Ontario Act.

The Manitoba case was heard in the Courts of the province in the same year, 1917, as the Ontario case, but a little earlier. Macdonald, J., the Judge of first instance, decided in favour of the validity of the legislation, but apparently without giving reasons. On appeal the Court of Appeal of the province was evenly divided, with the result that the appeal was dismissed. Chief Justice Howell and Cameron, J.A., were for affirming, while Perdue, J.A., and Haggart, J.A., were for reversing.

Howell, C.J., began his judgment by pointing out that the province derives part of its revenue from charges for the incorporation of companies and for licenses, and that all companies doing business in Manitoba, no matter where incorporated, have to pay what is sometimes called a tax and at others a fee for a license. He thought that the Manitoba Statute should be taken to have been enacted " for the purpose of completing the provincial scheme of direct taxation for the general purposes of the province by a general charge or tax on all corporations, as in *Bank of Toronto* v. *Lambe* (12 A.C. 575)." The decision in that case also disposed, in the view of the learned Chief Justice, of the argument that the discretionary power of prescribing conditions and limitations constituted an objection to the validity of the scheme of the Act, for there was no power to refuse a license generally, like that in the British Columbia Statute.

Cameron, J.A., also dwelt on this distinction, and on the more restricted scope of the Manitoba Act in other points. As to the imposition of penalties, that carried the matter no further, for the true test was whether the substantive provision was authorized by section 92. He arrived at the conclusion that the Companies Act was one the legislation in which was of such a general character as was saved by the decision in the John Deere Plow case, being in reality wholly directed to subjects entrusted to the Provincial Legislatures by section 92 of the British North America Act.

Perdue, J.A., dissented. Section 111, enabling the Lieutenant-Governor-in-Council to insert in the license limitations and conditions as to the exercise of the company's powers within the province, showed that there was really no difference in this respect between the Manitoba Act and that declared *ultra vires* in the John Deere Plow case. He thought that for the purposes of the question there decided the provisions of the two Acts were indistinguishable. The object of such Statute was, in his view, to restrain Dominion companies from exercising within the province the rights conferred on them by their charters, unless licensed. The decisions of the Privy Council in *Bank of Toronto* v. *Lambe* (*ubi supra*) and the Brewers and Maltsters case (1897, A. C. 231), were not really in point, for they only established that what had to be paid was in these cases in the nature of direct taxation. Here the Provincial Legislature had gone further and had failed to confine their legislation within the limits which were settled by the John Deere Plow case to be those of what was legitimate.

Haggart, J.A., concurred in this conclusion.

There was in this case, unlike that of Ontario, an appeal to the Supreme Court of Canada, which also heard an appeal from the Supreme Court of Saskatchewan. The judgments of the Supreme Court of Canada, dismissing both appeals, were given on the same date, Idington, J., Anglin, J., and Brodeur, J., taking one view, and the Chief Justice and Mignault, J., dissenting. It will be convenient to reserve consideration of these judgments until reference has been made to the Saskatchewan cases, which were disposed of along with those from Manitoba.

The four Saskatchewan Companies Acts, now operative, differ from those of Ontario and Manitoba in the circumstance that they were passed in 1915, 1916 and 1917, after the decision in the John Deere Plow appeal to this Committee. It is the first of these four Acts that alone is important for the purpose of the present question. This is a general Companies Act, the provisions in which have nothing unusual in them, but which extends to, *inter alia,* Dominion companies having gain for their object, and carrying on business in the province. The effect of section 23 is that a Dominion company of this nature must be registered under the Act, and that if it does not register, the Dominion company and its representatives are liable to penalties for carrying on business in the province. The effect of section 24 is that registration cannot be refused to a Dominion company. By section 25 the company may, on complying with the provisions of the Act, receive an annual license, for which it is to pay fees to the Government of the province, and may then carry on its business, subject to the provisions of the instrument creating it, as if it had been incorporated under the Act; but a company carrying on business without a license is liable to penalties. By section 27 the Lieutenant-Governor-in-Council may prescribe such regulations as he may deem expedient for the registration of all companies, and for fixing the fees payable. By section 29 if the Registrar thinks that a company registered has ceased to carry on business he may, after finding on enquiry that this is so, strike the company off the register, whereupon it is dissolved; but by an amending Act passed since the commencement of these proceedings the provision as to dissolution is to take effect only as to Saskatchewan companies. By section 30 if the prescribed fee is not paid the company may be struck off the register.

Proceedings were taken in Saskatchewan before a Justice of the Peace against a Dominion company for not being licensed or registered, and an action was brought by a shareholder, as in the cases of the other provinces already referred to. The substantial question was again the validity of the Provisional Statute, and this Statute Elwood, J., the Judge of the first instance, held to have been validly enacted. On appeal the Supreme Court of Saskatchewan, *en banc,* consisting of Haultain, C.J., Newlands, J., Lamont, J., Brown, J., and McKay, J., dismissed the appeal unanimously. On appeal to the Supreme Court of Canada that Court also unanimously dismissed the appeal.

Elwood, J., thought that the fees imposed were direct taxation, and that there was no prohibition of carrying on business without license or registration, but merely a penalty, which did not interfere with the status of the company.

The judgment of the Supreme Court of Saskatchewan was delivered by Newlands, J. He pointed out that the form of the existing Act, which was passed in 1915, after the decision of the Judicial Committee in the John Deere Plow case, made it evident that the Legislature of the province had endeavoured to get rid of what might have been held to be objectionable in older legislation. For example, the old provision had been dropped, according to which any company requiring to be registered should not, while unregistered, be capable of suing in the Courts of the province. It was true that there was still a provision that every company carrying on business in the province without a license was to be guilty of an offence and liable to a penalty; but this did not necessarily render its contracts void. The prohibition of a particular act under a penalty was altogether different from requiring a general regulation to be complied with under a penalty. It was not really the intention of the Legislature to prevent the company from doing business, but only to designate what companies were to be registered and pay license fees. The status and powers of the Dominion company were, therefore, not affected.

In the Supreme Court of Canada the decisions in the Saskatchewan and Manitoba cases were reviewed and affirmed. There was no appeal brought there from the

Ontario judgment, but the decision of the Ontario Court of Appeal had been given more than a year previously and the reasons for it were alluded to in the Supreme Court of Canada in the other cases. It will be convenient to consider together the judgments in the other two cases, which were delivered on the same day.

In the Manitoba appeal the Chief Justice of Canada dissented and would have reversed. For he took the same view as Perdue, J.A., had expressed in the Court below. He thought that the Manitoba Act, if valid, would deprive the Dominion companies of their status and powers, notwithstanding that section 18 of the British Columbia Act did not occur in it; the section which prohibited the registration of an extra-provincial corporation with a name of which the Registrar disapproved. But while he formed this opinion about the Manitoba Act he thought otherwise about that of Saskatchewan, which he held had been so framed as to get over the difficulties indicated in the decision in the John Deere Plow case. His view was that in the latter Act the provisions were confined to the levying of direct taxation, and that its construction was such that if a Dominion company paid the tax it could carry on business without taking out a license. But while arriving at this conclusion he stated that he had done so with difficulty and doubt, and that he considered the statute objectionable in form, though not in essence.

Anglin, J., expressed an opinion similar in doubt as to the Manitoba Legislation, but on the whole he thought that the decision in the Manitoba case might be affirmed, though he arrived at that conclusion only after doubt. As to the Saskatchewan appeal he thought the provisions of the Act there distinguishable, and he concurred in the reasons given by his colleagues for the dismissal of the appeal.

Brodeur, J., laid much stress in the Manitoba case on the title of the Dominion company to have a license as of right. The license he considered to be a mere method of effecting direct taxation. He took the same view of the Saskatchewan Legislation. The obligation of a Dominion company to take out a license was under a law of general application, and was a mere means of taxation. He concurred in the dismissal of both appeals.

Idington, J., agreed. The cases seemed to him to turn on the same question, whether a Provincial Legislature could tax a Dominion company. He thought the earlier decisions of the Judicial Committee had established that it could do so in this kind of form. No one of the enumerated powers in section 91 enabled the Dominion Parliament to entitle a Dominion company to escape from the obligations of a private citizen in the province.

Mignault, J., agreed as regards the Saskatchewan appeal. The Statute there was a pure taxing Statute, and the Dominion companies were not prohibited from carrying on business in the province, but were merely subjected to a penalty for not taking out a license. In the Manitoba case he dissented from the majority, and thought that there should be a reversal. For the companies were by the Statute compelled to take out a license as a condition of exercising their powers in the province, and of invoking the jurisdiction of its Courts. He agreed with the view taken by Perdue, J.A., in the Court below.

Their Lordships have thus examined in some detail the course of the proceedings in the case under consideration, and have stated the substance of the various judgments given. There has been much divergence of opinion in these judgments. It has arisen over the single question which is the crucial one in these appeals. Can the relevant provisions of all or any of the three sets of Provincial Statutes be justified as directed exclusively to the attainment of an object of Legislation assigned by section 92 to the Legislatures, such as is the collection of direct taxes for provincial purposes; or do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion, and so affect its status? The question is one primarily of the interpretation of the British North America Act and in the second place of the meaning of the principle already laid down by this Committee in the John Deere Plow case. The Constitution of Canada is so framed by the British North America Act that the difficulty was almost certain to arise. For the power of a province to legislate for the incorporation of companies is limited to companies with provincial objects, and there is no express power conferred to incorporate companies with powers to carry on business throughout the Dominion and in every

province. But such a power is covered by the general enabling words of section 91, which, because of the gap, confer it exclusively on the Dominion. It must now be taken as established that section 91 enables the Parliament of Canada to incorporate companies with such status and powers as to restrict the provinces from interfering with the general right of such companies to carry on their business where they choose, and that the effect of the concluding words of section 91 is to make the exercise of this capacity of the Dominion Parliament prevail in case of conflict over the exercise by the Provincial Legislatures of their capacities under the enumerated heads of section 92. It is clear that the mere power of direct taxation is saved to the province, for that power is specifically given and is to be taken, so far as necessary, on a proper construction to be an exception from the general language of section 91, as was explained by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (7 A. C., p. 108). Nevertheless, the methods by which the direct taxation is to be enforced may be restricted to the bringing of an action, with the usual consequences, which was all that was decided to be legal in *Bank of Toronto* v. *Lambe* (*ubi supra*). It does not follow that because the Government of the province can tax that it can put an end to the existence or even the powers of the company it taxes for non-compliance with the demands of the tax-gatherer. Their Lordships find themselves unable to agree with an observation made by Meredith, C.J., towards the conclusion of his judgment. "It is," he says, "I think to be regretted that at the outset it was not determined that the authority of the Parliament of Canada to incorporate companies was limited to creating them and endowing them with capacity to exercise such powers as it might be deemed proper that they should possess, but leaving to each province the power of determining how far, if at all, those powers should be exercised within its limits." Such a construction would have left an *hiatus* in the British North America Act, for there would have been in the Act so read no power to create a company with effective powers directed to other than merely provincial objects. It was decided as long ago as 1883, in *Colonial Building Investment Association* v. *Attorney-General of Quebec* (9 A. C. 157) that there was no such *hiatus*. Nor does it appear, if reference may be made as matter of historical curiosity to the resolutions on which the British North America Act was founded, and which were passed at Quebec on the 10th October, 1864, for the guidance of the Imperial Parliament in enacting the Constitution of 1867, that these resolutions gave countenance to the idea that a different construction on the point in question was desired. The learned Chief Justice refers to them without quoting their language. But, in connection with the topic in controversy, all that was desired by the words of these resolutions to be assigned to the Provincial Legislatures was "the incorporation of private or local companies, except such as relate to matters assigned to the General Parliament."

In *Tennant* v. *The Union Bank of Canada* (1894, A. C. 31) it was decided that the British North America Act must be so construed that section 91 conferred powers to legislate which might be fully exercised even though they modified civil rights in a province, provided that these powers are clearly given. The rule of construction is that general language in the heads of section 92 yields to particular expressions in section 91, where the latter are unambiguous. The rule may also apply in favour of the province in construing merely general words in the enumerated heads in section 91. For, to take an example, notwithstanding the language used at the end of section 91, the heading in that section, "Marriage and Divorce," was interpreted on an appeal to this Committee in the Marriage Laws case (1912, A. C. 880) as being *pro tanto* restricted by the provision of section 92 which entrusted the making of laws relating to the solemnization of marriage to the Provincial Legislatures. Whether an exception is to be read in in either case depends on the application of the principle that language which is merely general is, as a rule, to be harmonized with expressions that are at once precise and particular by treating the latter as operating by way of exception. The two sections must be read together, and the whole of the scheme for distribution of legislative powers set forth in thier language must be taken into account in determining what is merely general and what is particular in applying the rule of construction. For neither the Parliament of Canada nor the Provincial Legislatures have authority

under the Act to nullify, by implication any more than expressly, Statutes which they could not enact. The decision in 1896 of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (*ubi supra*) is a good illustration of the fashion in which the rule of construction thus stated has been interpreted and applied.

It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinized in its entirety in order to determine its true character: *Madden* v. *The Nelson, etc. Railway Company* (1899, A. C., 629), and *Canadian Pacific Railway Company* v. *Corporation of Notre Dame de Bonsecours* (at p. 367 in the same volume), are excellent illustrations of how this has been done. In the first-mentioned case a Provincial Legislature, by a Cattle Protection Act, sought to make a Dominion railway company liable for injury to cattle straying on the line within the province, unless they had erected proper fences. It was held that the province had no power to impose liability on the Dominion railway companies as such for the provision of works. It was pointed out in the latter case that a very different point really arose, namely, that although any direction by a Provincial Legislature to a Dominion railway company to alter the construction of the drains on its works would be *ultra vires*, still the railway company were not exempted from the obligation of a provincial law applicable to all land owners, without distinction, that they should clean out their ditches so as to prevent nuisance.

In cases such as those referred to the rule of construction above stated has been applied wherever possible. It is only where there is actual inconsistency that the effect of the concluding words of section 91 can be invoked. *Attorney-General of Manitoba* v. *Manitoba License Holders' Association* (1902, A. C. 73) is yet another useful illustration. The Legislature of Manitoba had enacted the prohibition of transactions in liquor to take place wholly within the province, with the saving of *bona fide* transactions between persons in the province and those in other provinces or in foreign countries. It was held that such legislation was valid as falling within head 16 of section 92, "matters of a merely local or private character in the province," notwithstanding that its effect would be to interfere consequentially with sources of Dominion revenue and with business operations beyond the province. *Union Colliery Company* v. *Bryden* (1899, A. C. 587) and *Cunningham* v. *Tomey Homa* (1903, A. C. 151) also furnish illustrations of how the rule of construction under consideration has been applied.

The only other decision to which their Lordships desire to make reference is that in *Brewers and Maltsters' Association* v. *Attorney-General of Ontario* (*ubi supra*). Then the Dominion Legislature had previously and validly regulated the manufacture and wholesale vending of spiritous liquors, and provided for the issue of licenses for such manufacture and sale. Ontario had subsequently passed an Act requiring every person so licensed by the Dominion also to obtain a license for sale from the province, and to pay a fee for it. It was held in the first place that this was direct taxation for provincial purposes, and therefore within the power of the province, and secondly that the license was such as to be authorized among the "other licenses" included in the general words of head 9 of section 92—"shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial purposes." Their Lordships think that what is implied in this decision is that while the Dominion Legislature had power to place restrictions throughout Canada on the traffic in liquor, the powers conferred by section 91 did not in any way conflict with the positive powers of taxation and licensing for provincial objects, expressly and particularly conferred by section 92. These, in so far as there might have been any interference, had been conferred by the Imperial Parliament on the provinces by way of exception both from the general power of legislation given to the Dominion by the initial words of section 91, and from any purely general enumerated head, such as the regulation of trade and commerce.

The principle of interpretation to be followed in applying the test laid down in the John Deere Plow Company case, that Provincial Legislation cannot validly destroy the status and powers conferred on a Dominion company by Act of Parliament of Canada, does not appear to be obscure when read in this light. Turning

to its application, the first thing to be observed is the nature of the questions to be answered. Their Lordships will dispose in the first place of a subsidiary matter, which is whether a Dominion company can be precluded from acquiring and holding land in a province by a provincial law of the nature of a general Mortmain Act. It is clear, both on principle and from previous decisions, that it is within the competence of a Provincial Legislature to enact such legislation, and the question is therefore answered in the affirmative. If there be a provision to this effect, occurring even in a Statute which in other respects is *ultra vires,* and that provision be severable, it is valid. In the Ontario case there is therefore no doubt that the broad result of the contention of the province under this head is well founded; for there the Legislature has passed a Mortmain Act of general application, and in regard to this Act a Dominion company is in no better position than any other corporation which desires to hold land.

In Manitoba there is no general Mortmain Act, but section 112 of the Manitoba Companies Act enables a corporation receiving a license under Part IV. of the Act, relating to extra-provincial companies, to acquire and hold land as freely as could any company under Part I. of the Act. Even if the provisions as to the licensing of extra-provincial companies is held to be *ultra vires,* so as to prevent such a provision from being operative, as being inseverable, it is plain that the substance of a provision which is of the character of a mortmain law is within the power of the province.

In Saskatchewan there is no general Mortmain Act, but the Companies Act of 1915, by section 19, enables a company incorporated under the law of the province to hold land. By section 25 a company not so incorporated (and this includes a Dominion company) may, if it has been licensed, carry on its business as if it had been incorporated under the law of the province. This enables it to hold land unless the provisions as to the grant to it of a license are inoperative. Their Lordships do not think that section 29 of the Companies Act of Canada, which purports to enable a Dominion company to acquire and hold real estate requisite for the carrying on of its undertaking, can prevail against any severable provision by a Provincial Legislature restricting the power of corporations generally to acquire or hold real estate in the province.

Their Lordships now pass to the question of a more general order, which is the main one in these appeals. Had the provinces of Ontario, Manitoba and Saskatchewan power to impose on Dominion companies the obligation to obtain a license from the Provincial Government as a condition of the exercise in these provinces respectively of the powers conferred on them by the Dominion?

If the condition of taking out a license had been introduced, not so as to affect the status of the Dominion company, but simply for the purpose of obtaining payment of a direct tax for provincial purposes, or of securing the observance of some restriction as to contracts to be observed by the public generally in the province, or of causing the doing, by that public generally, of some act of a purely local character only under license, their Lordships would, for reasons already given, have been prepared to regard the condition as one which it was within the power of the province to impose. Even then it would have been requisite to see, as was pointed out by Lord Herschell, in delivering the judgment of the Judicial Committee in the Brewers and Maltsters case (1897, A. C. 231, at p. 237), that the Provincial Legislature was not, under the guise of imposing such direct taxation, in the form of which he was speaking as being within their power, really doing something else, such as imposing indirect taxation. As to any inquiry in the future whether this or anything analogous has been in substance attempted, their Lordships hold themselves unfettered. If, for example, such a question were to arise hereafter, involving consideration of whether the real effect of the license required by a provincial law has been to abrogate capacity which it was within the power of the Parliament of Canada to bestow, or whether for a breach of conditions a Provincial Legislature could impose, not an ordinary penalty but one extending to the destruction of the status of the company and its capacity in the province, nothing that has been here said is intended to prejudice the decision of such a question, should it occur. It is sufficient to observe once more that in such matters what cannot be done directly can no more be effected by indirect methods.

What remains is to apply the principle of the decision in the John Deere Plow case as so interpreted to the actual Provincial Legislation challenged.

As to Ontario, the Statute impugned is the Extra-Provincial Corporations Act in its application to Dominion companies. Their Lordships have come to the conclusion that the real effect of this Act, as expressed or implied by its provisions, is to preclude companies of this character from exercising the powers of carrying on business in Ontario, to the same extent as in other parts of Canada, unless they comply with a condition sought to be imposed, that of obtaining a license to do so from the Government of the province. By section 7 such companies are expressly prohibited from doing so, and the provision in section 9(2) that no limitations or conditions are to be included in such a license as would limit a Dominion company, for example, from carrying on in the province all such parts of its business, or from exercising there all such parts of its powers, as its Act or charter of incorporation authorizes, does not in their Lordships' opinion sufficiently mend matters. For the assertion remains of the right to impose the obtaining of a license as a condition of doing anything at all in the province. By section 11 the grant of the license is made dependent on compliance with such regulations as may happen to have been made by the Lieutenant-Governor-in-Council under sections 2 and 10 of the Act. By section 16, and also under section 7 itself an extra-provincial corporation required to take out a license is to be fined for not doing so, and, under section 16, is to be incapable of suing in the Courts of the province. Their Lordships are of opinion that these provisions cannot be regarded as confined only to such limited purposes as would be legitimate, and that they are, therefore, *ultra vires.*

Taking next the Companies Act of Manitoba, Part IV. of this Act deals with extra-provincial corporations, including Dominion companies. The effect of the scheme of this part does not appear to their Lordships to differ in any feature that is material from that of the Ontario Act. *Inter alia* a Dominion company must take out a license, which it is entitled to receive if it complies with the provisions of the Act and with regulations to be made by the Lieutenant-Governor-in-Council. There may, under section 111, be limitations and conditions specified in the license, and if the company makes default in complying with these or certain other provisions, the license may be revoked under section 121. Unless the company obtains a license it cannot, nor can any of its agents, carry on business in Manitoba. Penalties are imposed for carrying on business without a license, and so long as unlicensed the company cannot invoke the jurisdiction of the Courts of the province. It does not alter the scope of these provisions that by section 126 fees are payable for the license, to be applied to the benefit of the revenue of the province.

Their Lordships are unable to take the view that these sections regarded together are directed solely to the purposes specified in section 92. They interpret them, like those of the Ontario Statute, as resigned to subject generally to conditions the activity within the province of companies incorporated under the Act of the Parliament of Canada. The restriction in this Statute as to the holding of land cannot be severed from the general provisions as to licensing so as to make those restrictions enforceable as being in the nature of Mortmain legislation.

The Statute remaining to be considered is that passed by the Legislature of Saskatchewan in 1915, a general Companies Act which, however, contains provisions applicable to Dominion companies. By section 23, if such companies carry on business in Saskatchewan, they must be registered under this Act, and if they carry on business without registering, the companies, and also the agents acting for them, are made liable on summary conviction to penalties. By section 24 such companies are entitled to be registered on complying with the provisions of the Act and on paying the prescribed fees. There are also payable annual fees. By section 25 such companies may upon certain conditions receive a license to carry on business in Saskatchewan, and if they carry on business without a license are guilty of an offence and liable to penalties. By section 29, where the Registrar satisfies himself in the prescribed manner that a company registered under the Act has ceased to carry on business, he may strike the company off the register, and it is then to be dissolved. By section 30, if the registration fees prescribed by the regulations made by the Lieutenant-Governor-in-Council be not paid, the Registrar is to strike the company off the register.

Here again their Lordships think that the Provincial Legislature has failed to confine its legislation to the objects prescribed in section 92, and has trenched on what is exclusively given by the British North America Act to the Parliament of Canada. If the Act had merely required a Dominion company, within a reasonable time after commencing to carry on business in Saskatchewan, to register its name and other particulars in the Provincial Register and to pay fees not exceeding those payable by provincial companies, and had imposed upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and levying a tax. But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion. Further, if it is the intention and effect of the Act that a Dominion company when registered in the province shall be subject (by virtue of the definition section or otherwise) to the general provisions of the Saskatchewan Companies Act or shall become liable to dissolution under section 29, the Act will be open to question on that ground; but it is right to say that such a construction was disclaimed by counsel for the Attorney-General of Saskatchewan and (as regards the liability to dissolution) has been excluded by an amending Act passed while these proceedings were pending. Section 25 of the Saskatchewan Act, which requires a Dominion company to obtain a license, stands on the same footing as the enactments in Ontario and Manitoba which have been held void as *ultra vires;* and in this case also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground.

The result is that their Lordships take the view which commended itself to a minority of the Judges in the Courts below, and find themselves unable to agree on the main question argued, either with the preponderating opinion expressed in the Supreme Court of Canada on the Saskatchewan and Manitoba Legislation, or with that of the majority of the Court of Appeal in Ontario on the validity of the Statute of that province, but that on the subsidiary question as to the Mortmain Act of Ontario they agree with the Ontario Courts.

The proper course will be to allow the appeals and to declare (1) That in the case of all four appellant companies the provisions of the parts of the Provincial Companies Acts which were the subject of the proceedings in the Courts of the provinces of Ontario, Manitoba and Saskatchewan, in so far as they purport to apply to the appellant companies respectively, are *ultra vires* of the Provincial Legislatures in each case, and that these companies are not precluded by reason of not having been licensed or registered under those Acts from carrying on business and exercising their powers in the three provinces, and are not liable to the penalties prescribed for having so carried on business and exercised their powers. (2) That in the case of the Province of Ontario none of the appellant companies can acquire and hold lands in the province without a license under the Provincial Mortmain Act, and that it is within the power of the other Provincial Legislatures to impose the requirement of a license directed to this purpose. The judgments of Mr. Justice Masten in the Ontario cases will be restored, and the other proceedings dismissed.

As regards costs their Lordships were informed that in the cases in the Courts below it was in certain of the proceedings agreed that there should be no costs. Having regard to the character of the questions raised, and to the circumstance that on one important point, that as to Mortmain, the whole of the contentions of the appellants have not been successful, they think that there should be no costs for any of the parties, either of these appeals or in any of the Courts below.

They will humbly advise His Majesty in accordance with what has been said.

IN THE PRIVY COUNCIL.

COUNCIL CHAMBER, WHITEHALL,
Tuesday, 30th November, 1920.

Present:

THE RT. HON. VISCOUNT HALDANE.
THE RT. HON. VISCOUNT CAVE.
THE RT. HON. LORD SUMNER.
THE RT. HON. LORD PARMOOR.

ON APPEAL FROM THE SUPREME COURT OF CANADA AND THE COURT OF KING'S BENCH OF THE PROVINCE OF ONTARIO.

BETWEEN—

THE GREAT WEST SADDLERY COMPANY, LIMITED,
APPELLANTS;

AND

THE KING AND ANOTHER,
RESPONDENTS;

AND

CONNECTED APPEALS CONSOLIDATED.

(Transcript from the shorthand notes of Cherer & Co., 8 New Court, Carey Street, W.C. 2.)

Counsel for the Appellants: Mr. F. W. Wegenast, K.C., and Mr. T. Moss (both of the Canadian Bar), (instructed by Messrs. Lawrence Jones & Co.).

Counsel for the Respondents the Attorneys-General of Ontario and Manitoba: The Hon. Wallace Nesbitt, K.C., of the Canadian Bar, and Mr. Geoffrey Lawrence (instructed by Messrs. Freshfields & Leese).

Counsel for the Attorney-General of the Province of Saskatchewan (Respondent): The Hon. S. O. Henn Collins.

Counsel for the Intervenant, The Attorney-General for the Dominion of Canada: The Rt. Hon. Sir John Simon, K.C., and Mr. Cyril Asquith (instructed by Messrs. Charles Russell & Co.).

Counsel for the Respondents, Messrs. Harmer, Davidson & Currie: Mr. C. Boville Clarke (instructed by Messrs. Blake & Redden).

VISCOUNT HALDANE: We had better just see how we stand in this case. The Great West Saddlery Co. are proceeding against the King. Is more than one province concerned? MR. WEGENAST: The Dominion is here represented by my learned friends Sir John Simon and Mr. Cyril Asquith.

VISCOUNT HALDANE: Are there any other Respondents? SIR JOHN SIMON: The Dominion are intervening.

VISCOUNT HALDANE: Who is the fighting Respondent? MR. WALLACE NESBITT: My Lords, I appear for the Provinces of Ontario and Manitoba, and my learned friend, Mr. Henn Collins, appears for the Province of Saskatchewan.

VISCOUNT HALDANE: Are you in the unhappy position of being the only person on your own side, Mr. Wegenast? MR. WEGENAST: Yes.

VISCOUNT HALDANE: The Great West Saddlery Co. are arrayed against all the Governments, are they? SIR JOHN SIMON: No, my Lord, the Dominion of Canada would be disposed to support the view of the Appellants. It is a question of whether a Provincial Statute validly interferes with the operation of a Dominion Company. It is like the *John Deere Plow* case.

VISCOUNT HALDANE: We must arrange first of all how the argument is to be conducted. Is it one point? MR. WEGENAST: I think a number of points, or

at all events the case put in a number of ways, as we found it necessary in the *John Deere Plow* case.

VISCOUNT HALDANE: The *John Deere Plow* case was with regard to one point? MR. WEGENAST: Yes. It is the same point in this case.

VISCOUNT HALDANE: I am not saying that we desire in any way to interfere with you, but I merely say this, that when it is a broad general question their Lordships are not in the habit of hearing more than two Counsel on each side. We never enforce that rule so as to embarrass justice, but what we ask the parties to aim at is, two Counsel for each contention, so that in that case I suppose you and Sir John Simon will argue for the Appellants? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Then who will argue for the Respondents, Mr. Nesbitt? MR. WALLACE NESBITT: I thought of addressing your Lordships generally on the question, and then asking you to hear my learned friend Mr. Geoffrey Lawrence, who is with me, on certain sections of the Statute, and to hear my friend Mr. Henn Collins on behalf of the Attorney-General of the Province of Saskatchewan.

VISCOUNT HALDANE: Is there any difference between Saskatchewan and the others? MR. WALLACE NESBITT: Yes, there is a very marked difference.

VISCOUNT HALDANE: There may be a material point there. Then we will take it that Mr. Wegenast and Sir John Simon will present the case for the Appellants; Mr. Nesbitt will open the general question for the Respondents, and then there are two other provinces.

MR. WALLACE NESBITT: My Lords, I appear for Ontario and Manitoba. Mr. Geoffrey Lawrence is with me for both those provinces. Saskatchewan is different.

MR. HENN COLLINS: I appear for the Attorney-General of Saskatchewan.

VISCOUNT HALDANE: It is plain that you have a right to be heard.

MR. HENN COLLINS: My case rests upon slightly different considerations, as I shall submit.

VISCOUNT HALDANE: But as regards the main contention it is the same? MR. HENN COLLIN: Yes, my Lord.

VISCOUNT HALDANE: Just as we are not hearing the Juniors in the other case, so we might hear the two leaders in this case. What do you think of that? MR. WALLACE NESBITT: I shall deal generally, and not at great length with the case, because this question has been thrashed out; your Lordships have had it over and over again before you. I had hoped that you would hear my friend Mr. Geoffrey Lawrence and Mr. Henn Collins on some section in the Statute, if you think it important, when we come to them.

VISCOUNT HALDANE: We shall not lay it down very rigidly *a priori,* but what we want to aim at is to have the case presented as far as possible by two Counsel on each side. MR. WALLACE NESBITT: What your Lordships want to get at is what the case is about, and not to waste time.

VISCOUNT HALDANE: Yes, and of course if you find, Mr. Nesbitt, that your case divides itself, and you wish to leave something to Mr. Lawrence, you will do so. You will consider that as the case goes on. MR. WALLACE NESBITT: If your Lordship pleases.

MR. WEGENAST: My Lords, I think you will find it convenient to look at the Statutes in question, perhaps before examining the facts of the case in detail, because the facts will then be more easily intelligible.

VISCOUNT HALDANE: You are probably right, but first of all we should like to know the general sort of question. I have not looked at the Record yet. MR. WEGENAST: If you Lordship pleases. There are six cases, three from Saskatchewan, one from Manitoba, and two from Ontario. Two of the Saskatchewan cases, that is to say the case of the Great West Saddlery Company, and the case of the John Deere Plow Company, which company has already been before your Lordships, are cases arising out of Police Court prosecutions against these companies for carrying on business without being registered or licensed under the Saskatchewan Act. The third Saskatchewan case, the case of *A. Macdonald & Co., Ltd.* v. *Harmer,* is a case in form similar to the case of the *John Deere Plow Company* v. *Wharton,* that is to say it is a case brought by a shareholder of the

company for an injunction to restrain the company from carrying on business without being registered or licensed.

VISCOUNT HALDANE: That is just a repetition of Wharton's case. MR. WEGENAST: Yes.

VISCOUNT HALDANE: That disposes of Saskatchewan? MR. WEGENAST: Yes. From Manitoba there is the case of the *Great West Saddlery Company* v. *Davidson.*

VISCOUNT HALDANE: Is that the same saddlery company? MR. WEGENAST: Yes.

VISCOUNT HALDANE: They are sued in both provinces? MR. WEGENAST: Yes.

VISCOUNT HALDANE: They are prosecuted in one, and are sued in the other? MR. WEGENAST: Yes.

VISCOUNT HALDANE: What is that? MR. WEGENAST: It is an action similar to the John Deere Plow Company's case, by a shareholder against the company. In Ontario there are two cases, one, *The Harris Lithographing Company* v. *Currie,* which is also a shareholder's action similar to the other two cases of *Harmer* v. *Davidson.*

VISCOUNT HALDANE: There is no prosecution. MR. WEGENAST: There is in addition in Ontario an action by the Attorney-General of Ontario against the Harris Lithographing Company, which appears here as an appeal by the company against the Attorney-General for Ontario.

VISCOUNT CAVE: Is that an information? MR. WEGENAST: It is in the form of an action for a declaration. It was originally brought against both parties to the other case.

VISCOUNT HALDANE: You have told us very clearly what the nature of the matter is. MR. WEGENAST: May I now refer at once to the provisions of the Dominion Companies' Act, which are challenged in these actions.

VISCOUNT HALDANE: It may be convenient for the other members of the Court who did not sit on the John Deere Plow case that we should recall, without going into it in any detail, what was decided there. According to my recollection—I think I delivered the opinion of their Lordships, it is a long time ago—there was a Dominion Company incorporated under the Dominion Companies' Act, which purported to have conferred upon it by the Dominion the right to carry on business all over the Dominion of Canada in every province. The Provincial Statutes, one of British Columbia, said no company shall carry on business whatever it is, whether it is a company incorporated within the province or outside, unless it conforms to certain restrictions. The question was whether the restrictions so imposed, which were of a very stringent nature, were such as to prevent the exercise by the John Deere Plow Company of its rights of a company under the Dominion Statute, assuming that these rights had been validly conferred by the Dominion, and it was held, according to my recollection, that the British Columbia Statute was *ultra vires* in so far as it purported to cut down as a consequence the right of the Dominion company to carry on business all over Canada. That was held to be so under section 91, which gives exclusive jurisdiction with regard to regulation of trade and commerce to the Dominion. It was held that the Dominion Parliament could pass that law, and under that Act, there was power to give the John Deere Plow Company the capacity to trade, as a result of this Statute in British Columbia, as much as in any other part of Canada, and British Columbia would not take it away. True, it was said, British Columbia had to regulate property and civil rights of a local character, but this must be read as controlled by the paramount words of section 91. Is that what was decided in the John Deere Plow case? MR. WEGENAST: Yes, except, perhaps, this: that the regulations to which we objected in British Columbia did not apply to the local companies. That piled up the aggravation.

VISCOUNT HALDANE: That made it worse? MR. WEGENAST: Yes.

VISCOUNT HALDANE: Then I suppose, the legal advisers in these matters, have considered the judgment in the John Deere Plow case, and have formed the opinion that they could devise Statutes which would evade it? MR. WALLACE NESBITT: No, my Lord.

VISCOUNT HALDANE: I am not using the word "evade" in any wrong sense, I simply mean, to make them outside the law. MR. WALLACE NESBITT: No, my Lord, the Statutes that we are supporting have been in force since 1877.

VISCOUNT HALDANE: At any rate these Statutes were not struck at by the decision of this Board? MR. WALLACE NESBITT: Yes.

VISCOUNT HALDANE: You would have been absolutely justified if you had said: We will interpret the decision and pass legislation which does not conflict with it; but I gather you do not think it is necessary because you have these old Statutes. MR. WALLACE NESBITT: Yes, which have been in operation for forty years.

VISCOUNT HALDANE: Is that so with regard to all the provinces? MR. WALLACE NESBITT: No. Saskatchewan did pass an Act after your Lordship's decision.

VISCOUNT HALDANE: It is not in the least to its discredit. They are entitled to do that. MR. WALLACE NESBITT: Ontario has had it since 1877.

VISCOUNT HALDANE: I do not think there is a very material difference in your favour. The representatives of Saskatchewan are in just as good a position. MR. WALLACE NESBITT: The provinces would not hesitate to pass any Act they thought necessary to bring themselves within their legislative jurisdiction.

VISCOUNT HALDANE: It is their Constitutional right to do so. MR. WEGENAST: On that point, Saskatchewan has a new Act, passed in 1915, and it was said by the Attorney-General in the argument before the Supreme Court of Canada that that Act had been passed with a view to avoid the difficulties placed in the way of the province by the John Deere Plow case. Then the Manitoba and Ontario Acts are as they were before the John Deere Plow decision. The Ontario Act was passed in 1900, and is the parent of all *these* Acts. The Manitoba Act was passed in 1900. The Ontario Act was, as a matter of fact, disallowed by the process usually adopted in such cases of securing an undertaking from the Provincial Government that the Act would be either amended or repealed.

VISCOUNT HALDANE: What usually happens in those cases? Does the Lieutenant-Governor of the province send it up automatically? Suppose he does not send it up. Is he bound to send it up? MR. WEGENAST: Yes.

VISCOUNT HALDANE: He must be called upon. He has the right to give the Royal Assent to that Act in the province. MR. WEGENAST: Yes.

VISCOUNT HALDANE: But how does the Governor-General get at the Act? MR. WEGENAST: I cannot say. The Provincial Statutes are regularly examined by the Department of Justice at Ottawa, and reports are made to the Cabinet.

VISCOUNT HALDANE: So that the Governor-General in fact, in withholding the Royal Assent under his reserved power, takes into account, I suppose, to some extent, the advice of the two sets of Ministers. MR. WALLACE NESBITT: No, only one set.

VISCOUNT HALDANE: I should like to be clear about that. He does not consult with the Manitoba Ministers? MR. WALLACE NESBITT: No, nor does he accept the Ontario legislation. That is done by the Lieutenant-Governor-in-Council.

VISCOUNT HALDANE: Of course it is. I follow that. The Lieutenant-Governor confers with his own Ministers in the province, and, as a rule, allows the Act, it is like the Sovereign here, unless he detects constitutional questions in it, but if it is a pure matter of discretion, if the matter is within his power, and it is expedient, then I suppose he acts on the advice of his own Ministers, but when the matter gets to the Governor-General the Governor-General takes the advice of his own Ministers. MR. WALLACE NESBITT: It never gets there except after the Act is passed. As Mr. Wegenast says somebody in the Department of Justice examines the various Provincial Acts, which are assented to by the Lieutenant-Governors. If on the examination by the Department of Justice they think there is some infringement upon the Dominion authority the Minister of Justice makes a report to the Cabinet, the Governor-in-Council, and then it would come to him.

VISCOUNT HALDANE: That is what I do not follow. MR. WEGENAST: Then it might be disallowed.

VISCOUNT HALDANE: I have followed this very carefully, and with great interest for other purposes, and under a section which comes just before section 91,

somewhere about section 90, the giving of the Royal Assent in the case of a Lieutenant-Governor is put on exactly the same footing as the giving of the Royal Assent by the Governor-General to a Dominion Act, except that it is the name of the Governor-General that is then inserted in place of the name of the Sovereign. There is an earlier section, section 65, which enables an Act passed by the Dominion to be disallowed within two years. MR. WALLACE NESBITT: Yes.

VISCOUNT HALDANE: But it has to be sent home. MR. WALLACE NESBITT: That is the Dominion Act.

VISCOUNT HALDANE: Yes. MR. WALLACE NESBITT: Yes.

VISCOUNT HALDANE: Has the Dominion Act to be sent over here? MR. WALLACE NESBITT: Yes, the Dominion Act has to be sent here.

VISCOUNT HALDANE: How does the Dominion Act get here? It is very important in construing section 90. MR. WALLACE NESBITT: It has never happened so far as I know.

VISCOUNT HALDANE: You see it in section 65. MR. WEGENAST: Section 65 is the one your Lordships construed so much in the Bonanza case.

VISCOUNT HALDANE: It is the Royal Assent section wherever it is. There are two Royal Assent sections. Section 65 is: "All powers, authorities, functions, which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom"———

VISCOUNT HALDANE: Where is the Royal Assent? It is section 55, is it not: "Where a Bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure." MR. WEGENAST: Then by section 56 he sends it over.

VISCOUNT HALDANE: That clears the matter up. That being so the Lieutenant-Governor is bound to send up the bill to the Governor-General. MR. WEGENAST: It does not appear from that.

VISCOUNT HALDANE: This is a section which puts the province in the same position as the Dominion. When the Lieutenant-Governor of Ontario had this Bill, which became the Act in question here, he had sent it up under a Statutory duty. SIR JOHN SIMON: The particular application was under section 90, which says: "The following provisions of this Act," and one of them is "The disallowance of the Acts," and you, therefore, turn back to find a provision which deals with the disallowance of Acts, and it is section 56. Therefore, section 56 has to be read so as to apply, not to the Governor-General, but to the Lieutenant-Governor, with certain substitutions, one of which is the one year instead of two years.

VISCOUNT HALDANE: And the Governor-General takes the place of the Crown.

SIR JOHN SIMON: Yes, my Lord. The result is that you may read section 56 in this way so far as Saskatchewan is concerned: "Where the Governor-General assents to a bill of Saskatchewan, he shall by the first convenient opportunity send an authentic copy of the Act to the Governor-General," not to the Secretary of State.

VISCOUNT HALDANE: The Governor-General is advised by the Dominion Ministers on that, but I suppose it is a matter in which there is a certain amount of discretion. I suppose he takes into account the view of the province too. I do not mean that he communicates with the Ministers of the province, obviously he cannot do that, but surely it is a fact that he takes into account that in a matter that is *intra vires* the province, the province has pronounced. The Legislature of the province is not a subordinate Legislature, as has been said by this Board. It is co-ordinate with the Dominion Legislature and Executive. I suppose you do not know what is done, Mr. Nesbitt? MR. WALLACE NESBITT: I do know practically. The power of disallowance has, I think my friend Mr. Wegenast will agree with me, practically been written out and set aside, because no one wants to burn their fingers with it; it raises such a row in the province.

VISCOUNT HALDANE: Obviously it must, because within the province the Provincial Parliament has the same power as the Dominion Parliament itself. Therefore, it would be wholly wrong to veto bills relating to internal matters in the province merely because a Dominion Minister did not like them. It must be upon some

broad ground of policy that disallowance takes place, and that very seldom. One can see how it has become very much a dead letter. MR. WALLACE NESBITT: Yes. The first disallowance that came up was the New Brunswick Separate Schools Act. There was such a row raised about that politically that nobody wanted to touch the thing again. Then came the Rivers and Streams Bill, MacLaren's case. That led to at least one election. Since that time where the Dominion authorities, the Minister of Justice, did not feel that certain of the Provincial Legislation was in the general interest of the Dominion, he has drawn the attention of the Provincial authorities to it, and has asked them to give an undertaking that they would make such amendments as he thought desirable, or they would exercise the disallowance privilege which they had within a year. So far as I know there has not been anything disallowed in fact. MR. WEGENAST: Yes, that is the regular process.

VISCOUNT HALDANE: I should have thought the province would be right to say this is an Act within our competence, and we will not listen to you, but the Dominion Minister might say: This is bound to lead to a conflict of powers, and it is very inexpedient that there should be a conflict arising on a question of *ultra vires,* but it seems to me that the Governor-General is almost bound to take into account the view of the Provincial Minister as to a mere question of the general convenience within the province. No doubt they do, and if there are likely to be conflicts as you say, they do not allow the conflicts to arise. All we have to do with the matter here is that it is considered in 1900, and the Act allowed in a modified form. MR. WEGENAST: That is not quite what I am going to bring before your Lordships. Some thing turned in the judgments of the lower courts on the fact that this Act was not disallowed, and it is said that if these Acts had been so bad the Dominion might have disallowed them.

VISCOUNT HALDANE: I think we may at once relieve you from arguing on that point. MR. WEGENAST: All I wanted to point out was that the Act had been disallowed in this case by the method usually adopted.

VISCOUNT HALDANE: It does not make any difference.

VISCOUNT CAVE: What happened? Was it amended? MR. WEGENAST: No. A change of Government occurred, and the new Government refused to be bound by the undertaking given by the old Government.

LORD PARMOOR: There was a new Government in the province there? MR. WEGENAST: Yes, and the year having elapsed the Act went automatically into force with such validity as it might have, and the other provinces followed suit.

VISCOUNT HALDANE: You refer to the Governor-General in place of the Sovereign. It is referred to the Governor-General in the case of the province in the same way that in the case of the Dominion it is referred to the Sovereign. That is within his legal competence, but you would expect the Sovereign to act as head of the Dominion, and take these things into account, and not to act in any arbitrary way moved thereto by considerations over here. MR. WEGENAST: As the late Chancellor Boyd put it in the St. Catharine's Milling Company's case, the power of Parliament operates in the plane of political expediency as well as that of Constitutional law so that one never knows exactly what the reasons were. I am entitled to make this point, that from Confederation the Dominion Government have consistently taken the position throughout, that this sort of legislation was *ultra vires,* and it was only because of this contretemps that this Act escaped disallowance. The Act to which my learned friend has referred of 1877 was actually disallowed, but that escaped the notice of Mr. Justice Cameron when he read the judgment.

VISCOUNT HALDANE: Which Act was that? MR. WEGENAST: An Act of Manitoba.

VISCOUNT HALDANE: It was disallowed. MR. WEGENAST: Yes. I think it was passed either in 1877 or 1878. I thought the volume of correspondence would be here, but it is not.

VISCOUNT HALDANE: I gather you are saying that disallowance is very infrequent; the Dominion prefer to refer the question to the Courts. SIR JOHN SIMON: In Bourinot's Parliamentary Practice in Canada it says, at page 88: "The same powers of disallowance that belonged to the Imperial Government previously to 1867 with respect to Acts passed by Colonial Legislatures have been conferred by

the British North America Act on the Government of the Dominion. It is now admitted beyond dispute that the power of confirming or disallowing Provincial Acts has been vested by law absolutely and exclusively in the Governor-General-in-Council. In the first days of Confederation it became, therefore, necessary to settle the course to be pursued in consequence of the large responsibilities devolved on the Governor-General, as it was considered of importance that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution, and only in cases where the law and general interests of the Dominion imperatively demanded it. The Minister of Justice, in 1868, laid down certain principles of procedure which have been followed up to the present time. On the receipt of the Acts passed in any province they are immediately referred to the Minister of Justice." That is also said in Higgins' Provincial Legislatures.

VISCOUNT HALDANE: That confirms my impression, and it also accounts for so many questions not arising in litigation being submitted to us here as questions of law. It is the convenient substitute. MR. WEGENAST: In the Supreme Court of Canada as your Lordships will observe on reading the judgments they reflect very severely on us as appellants for not coming direct to your Lordships Board instead of worrying them.

VISCOUNT HALDANE: Instead of waiting for litigation. MR. WEGENAST: Instead of worrying the Supreme Court of Canada. You will find that embodied in the judgment.

VISCOUNT HALDANE: You would have had to have got an Act of the Dominion Legislature submitting the questions. MR. WEGENAST: We thought that this Board having laid down the general principles in the John Deere Plow case, we ought to be able to get an application of them in the Supreme Court, and not worry your Lordships. In truth it was said both in the Supreme Court of Canada and in the Supreme Court of Ontario, that it would have been better if we had gone direct to your Lordships' Board.

VISCOUNT HALDANE: I do not know how you would have got here. MR. WEGENAST: Now I will come to the sections of the Dominion Companies Act which are challenged. May I refer your Lordships first to section 5.

MR. WALLACE NESBITT: We do not challenge Dominion legislation.

MR. WEGENAST: With submission, it is challenged. The Companies Act is in the Revised Statutes of Canada, chapter 79.

VISCOUNT HALDANE: Is it an old Act? MR. WEGENAST: It has come down from pre-confederation times. I should first like to refer your Lordships to the form as it appeared before Confederation.

VISCOUNT HALDANE: What have the Dominion to do with the Statute before Confederation? MR. WEGENAST: In one sense the whole case resolved itself into a question as to what powers formerly exercised by the Parliament of Canada survived the disconjunction effected by the British North America Act.

VISCOUNT HALDANE: The old Parliament of Canada was supreme, subject to the Imperial Act, and could deal with anything. MR. WEGENAST: Yes, and when we find this section, which was perfectly valid before Confederation, in a Dominion Act after Confederation the question arises how much of it has remained valid. Before Confederation it was quite competent for the Canadian Parliament that a company should have power to sue, and be sued, and hold personal property.

MR. WALLACE NESBITT: May I shorten my friend's argument. I do not propose to argue that the Dominion Legislation is not just what it expresses itself to be, perfectly valid.

VISCOUNT HALDANE: You are not contesting the Dominion Companies Act? MR. WALLACE NESBITT: No. my Lord.

VISCOUNT HALDANE: In the John Deere Plow case my recollection is that we drew no distinction between the sections, but we said the Act as a whole was valid. I do not know that the point was before us, but we treated it as a valid Act passed under the Regulations of Trade and Commerce section. MR. WEGENAST: Perhaps my learned friend will not object to my putting my argument in my own way. I submit there is a conflict between this section of the Dominion Act and the sections in question in the Provincial Acts.

VISCOUNT HALDANE: They may arise. MR. WEGENAST: That is what I am addressing myself to, and I want to point out the sections of the Dominion Act on which we base ourselves. When I say they are challenged, perhaps I was begging the question, but it is my way of putting my case. Section 5 provides that: "The Secretary of State may by Letters Patent under his Seal of Office grant a charter to any number of persons, not less than five, who apply thereto constituting such persons and others who have become subscribers to the Memorandum of Agreement hereinafter mentioned, and who thereafter become shareholders in the company, thereby created a body corporate and politic for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends," with certain exceptions which do not include this case. Then for the powers of the company, which in the Imperial Act are expressed in a section of the Companies Act, which one would naturally look for in a Companies Act, in the case of Dominion companies, one has to look to the Interpretation Act. It is section 30. Your Lordships will find it in my case. Then my Lords, on page 12 there is an abstract from the Interpretation Act of Canada, which provides that: "In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall (*a*) vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal, to alter or change the same at their pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure." That section, my Lord, I gather was deemed necessary. It was the first Act passed by the Dominion Parliament after Confederation, and one can read into that an intention to assimilate the law of Quebec as regards corporations with that of the rest of the Dominions.

VISCOUNT HALDANE: It does not determine what may sometimes be a material question. No doubt you will remember the occasion on which Lord Sumner and I sat in the Bonanza case. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: We decided that in Ontario as a company is created by charter and not by Statute the doctrine of the *Ashbury Railway Carriage & Iron Company, Limited* v. *Riche* does not apply. The doctrine which applies is what was decided by Lord Blackburn sitting in the Exchequer Chamber in the Court below, that the company is a Common Law person so far as things are restricted, and even then it was decided in appeal. It is conceivable that may have some bearing on the shareholder's action. MR. WEGENAST: Yes, my Lord, and one can read out of that section plainly a reference to the passage in Coke's Notes to the Sutton Hospital case.

VISCOUNT HALDANE: Which section is it? MR. WEGENAST: It is this section from the Interpretation Act.

VISCOUNT HALDANE: I was thinking it was very much against you at this moment because you see: "In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall (*a*) vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal, to alter or change the same at their pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is constituted," and then if you read that in connection with the section 29 of the Companies Act, which is just above: "Shall forthwith become and be vested with all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking as if it was incorporated by a Special Act of Parliament embodying the provisions of this part of the letters patent issued to such company." You will see it seems to take the best of a Special Act of Parliament, which has been taken here as defining the ambit for the purposes of *Ashbury Railway Carriage & Iron Company, Limited* v. *Riche*. MR. WEGENAST: Your Lordship said in the *John Deere Plow* v. *Wharton* case that this section 29 was an enabling section adding to its powers under its charter the additional powers which it might receive by way of a special Act—that it was an enabling section and an additional power.

VISCOUNT HALDANE: It may be that we shall have to examine the whole Statute and see how that was. Does this question arise? MR. WALLACE NESBITT: No, my Lord.

MR. WEGENAST: Yes, my Lord, it does. It arises in a very acute form.

VISCOUNT HALDANE: If so, I think we have the question before us as we had in the Bonanza case. MR. WEGENAST: You have essentially the same question only the obverse side of it. The question is this, if I may anticipate at this stage: Whether the Dominion company receives from its creator anything more than the metaphysical capacities which the provincial company has when it goes outside the province, and we understood your Lordships to have said in the Bonanza case, and afterwards more plainly in the Insurance Reference that the Dominion company gets something more.

VISCOUNT HALDANE: Well, just let us see where we are. If it gets something more it gets it by these special words in the Statute, or the words in the charter, too. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: The charter and the Statute? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: We decided in the Bonanza case this: that under the old Constitution of the old Province of Canada, companies were created as at common law in England, by charter. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: From the Lieutenant-Governor or Governor. Then we said that power has passed to the Lieutenant-Governor of Ontario? MR. WEGENAST: Yes, my Lord, for Provincial objects.

VISCOUNT HALDANE: Yes, for Provincial objects the Lieutenant-Governor of Ontario can, under the distribution of executive powers, constituted by, I forget which section of the Act, grant a charter incorporating a common law company for provincial objects, and although property and civil rights the Legislature of the province might cut that down or might restrict it, still it has not done so at any rate in this case. But the Company so constituted, the corporation so created, exists for all purposes and although it is incorporated for provincial objects it has a Statute which makes it a corporation throughout the world. It is not a corporation which exists only in Ontario. That being so we held that it should take a license or lease granted by the Dominion in respect of land outside the province. MR. WALLACE NESBITT: That was the case in the Yukon Territory.

VISCOUNT HALDANE: Yes, outside the Province of Ontario. Of course, it was argued on the other side that the company had only the powers which were named, which were set forth in its charter, and that the doctrine of the *Ashbury Carriage & Iron Company, Limited* v. *Riche* established that. We pointed out that the *Ashbury Carriage & Iron Company, Limited* v. *Riche* only established that under the English Companies Act of 1862 there is a section which says: The nature of the corporation is what flows from the memorandum. Here, there is no such section. The nature of the corporation flows from the charter, and any legislation must be restricted, but there is nothing restrictive of its capacity. Then the question arises what is the position as regards the Dominion. In the case of the Dominion, the Dominion doubtless succeeded to all the executive powers of the Governor of the old Province of Canada, who could create a common law company by charter. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Then the Dominion can do so unless under these sections to which you are referring us there is something taking it away. Of course, it may be there is. MR. WEGENAST: I think not, my Lord.

VISCOUNT HALDANE: When you come to the point, you are going to argue it? MR. WEGENAST: Yes, my Lord, and may I, just because this matter has come up in this form, read the way in which your Lordship put it in the Insurance Reference: "Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect, operative apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of *John Deere Plow Co.* v. *Wharton.* But if the company seeks only provincial rights and powers, and is content to trust for the extension of these in other provinces to the Governments of those provinces, it can at least derive capacity to accept

such rights and powers in other provinces, from the province of its incorporation, as has been explained in the case of the Bonanza Company." That is to say, the provincial company gets the right and power to operate in its own province. In addition to that it gets the capacity to accept powers from other provinces, but the Dominion company gets both the capacity and the power to carry on business throughout the whole of the Dominion.

VISCOUNT HALDANE: Now just let me ask this question with regard to this one point. Where was this company incorporated? MR. WEGENAST: In Manitoba, my Lord. That is under a Dominion charter.

VISCOUNT HALDANE: I do not know whether Ontario inherited the powers of the Province of Canada, but did not Manitoba not pass its own Companies Act? It may have done so? MR. WEGENAST: This company is incorporated under the Dominion Act.

VISCOUNT HALDANE: Purely Dominion? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Therefore the question does not arise? MR. WEGENAST: No, my Lord.

VISCOUNT HALDANE: It was on your expression: "In its own province," that I raised the query. It is true of Ontario, but I should have to look at the Constitution of the other provinces to see what they have done. MR. WEGENAST: The home of these companies, the appellant companies, is in the Dominion, we say.

VISCOUNT HALDANE: Very well. Then that raises the point directly: what was the status of these companies? MR. WEGENAST: Yes, my Lord, and what are its real powers, if any, by virtue of its Dominion incorporation or whether it gets anything more than a mere capacity———

VISCOUNT HALDANE: Now it is decided in the case of the John Deere Plow Company that it gets capacity right through Canada. MR. WEGENAST: Was not it said it gets power?

VISCOUNT HALDANE: It was to do anything that is authorized by the Crown under the Regulation of Trade and Commerce. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: But we made some restriction and limitations. MR. WEGENAST: Yes, my Lord, but it does not have to ask the province for leave to do these things.

VISCOUNT HALDANE: Unless the province has legislated under property and civil rights in a way which is consistent with its Dominion status. MR. WEGENAST: Yes, my Lord. Now may I go on with the section. Your Lordship has referred to section 29, and perhaps your Lordship will permit me to read it, which follows logically after section 30 of the Interpretation Act. A company incorporated under the Dominion Act, under section 29 of the Companies Act "shall forthwith upon incorporation become and be vested with all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking"—that is to say the word "undertaking" manifestly refers back to section 5, and under it the Secretary of State is authorized to incorporate a company for any of the purposes.

VISCOUNT HALDANE: You referred to section 29. I have the Revised Statutes of Canada of 1906, and section 29 refers to quite other things. MR. WEGENAST: Is it chapter 79, my Lord?

VISCOUNT HALDANE: The Interpretation Act is not there. MR. WEGENAST: It is chapter 79 of the Revised Statutes of Canada. I have the second volume—"as if it was incorporated by a special Act of Parliament embodying the provisions of this part and of the letters patent issued to such company." Words more comprehensive could hardly be devised.

VISCOUNT HALDANE: Now, just let us see: "As if it was incorporated by a special Act of Parliament, embodying the provisions of this part and of the letters patent issued to such company." If it was incorporated by a special Act of Parliament it would not come under the Sutton Hospital case doctrine. MR. WEGENAST: No, my Lord. It would come under Part 2 of the Companies Act, which provides a companies clauses system.

VISCOUNT HALDANE: It would come under whatever were the restrictions to be extracted from the words of the special Act of Parliament, in other words, the doctrine of *Ashbury Railway Carriage & Iron Company* v. *Riche*, would apply to it. MR. WEGENAST: Yes, my Lord, but as your Lordship has pointed out in

the Bonanza case, the doctrine of *Ashbury Railway Carriage & Iron Company, Limited* v. *Riche* does not apply to a company incorporated under Part 1 of the Companies Act. Your Lordship has pointed that out in the Bonanza case.

VISCOUNT HALDANE: Just wait a moment; let us see where we are. This is Part 1, is it not? MR. WEGENAST: Yes, my Lord.

MR. WALLACE NESBITT: Where is that stated in the Bonanza case?

MR. WEGENAST: Just at the bottom of page 582.

VISCOUNT HALDANE: That is reported in 1915 Appeal Cases.

VISCOUNT HALDANE: What had I to do in the Bonanza case with the Dominion Act? It was an Ontario Company. MR. WEGENAST: I should not like to answer that, my Lord. Your Lordship did deal with it in a paragraph.

VISCOUNT HALDANE: I may have been very rash. It was not before me. MR. WEGENAST: It is not vital to my case.

VISCOUNT HALDANE: I should like to see it. MR. WEGENAST: It is entirely consistent with everything else.

VISCOUNT HALDANE: I think Lord Sumner revised my judgment, and if we concurred in deciding things about the Dominion, we need not have done so. All I can say is that we were very rash. MR. WEGENAST: Your Lordship will see near the bottom of page 562 there is a paragraph, which perhaps I may read: "The Dominion Companies Act (chapter 79 of the Revised Statutes of 1906) is, so far as Part I is concerned, framed on the same principle, although the machinery set up is somewhat different. Part II stands on another footing."

VISCOUNT HALDANE: Yes, that is true. I said the machinery set up was somewhat different, and it may be that I thought the companies ought to be incorporated by letters patent. There is a material difference—"this part deals only with companies directly incorporated by special Act of the Parliament of Canada, and to these it is obvious that other considerations may apply. But the companies to which Part I. applies, like those under the old Statute, to be incorporated by letters patent, the only material difference being that the Act enables these to be granted by the Secretary of State under his own seal of office. When granted by section 5 they constitute the shareholders a body corporate and politic for any of the purposes or objects, with certain exceptions, to which the legislative authority of the Parliament of Canada extends." Yes, but we did not say anything which ignored the provisions of section 29, which may mean that there is a limitation put on. MR. WEGENAST: I read section 29 as giving us all the powers, at least, that we are asking for.

VISCOUNT HALDANE: You may be right, but I do not think those words said anything which prevents us from holding differently now, if we have to. MR. WEGENAST: There is nothing particularly turning upon it, except that I understood your Lordship to raise the question whether the Sutton Hospital case applied, and I think your Lordship suggested that that might have to be taken into consideration. I merely meant to say this.

VISCOUNT HALDANE: It is the words "as if it was incorporated by a special Act of Parliament," which may raise a question. MR. WEGENAST: In the John Deere Plow Company case your Lordship said that those words must be taken to be enabling words.

VISCOUNT HALDANE: We will look at that. That you say is in the John Deere Plow case, which is reported in 1915 Appeal Cases. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Section 5 is, of course, in your favour very much on this point, but then you must have to read section 28, which is material, if I may just read that before we come to the John Deere Plow Co. case: "All powers given to the company in letters patent or supplementary letters patent shall be exercised subject to the provisions and restrictions contained in this Part," and one of these is that it is vested with every power held by it, that is to say held by it before incorporation "as if it was incorporated by a special Act of Parliament, embodying the provisions of this Part and of the letters patent and supplementary letters patent issued to such company." Well there is apparently a question, which I think we have not touched in the other, unless we have touched it in the John Deere Plow Co.'s case. Where is the passage in the John Deere Plow Co.'s case?

MR. WEGENAST: I have not succeeded in finding it yet, my Lord, but I am certain it is here.

MR. WALLACE NESBITT: It is at pages 335 and 336 and the following pages. That is the only place where I see it refers to what you are now dealing with, towards the top of page 336 apparently. That is the only place I can see in the judgment, and there I see the words "as if it were incorporated by Act of Parliament."

SIR JOHN SIMON: I think it is a passage at the top of page 344.

VISCOUNT HALDANE: We seem to have given a rather wide berth to this question. MR. WEGENAST: However, may I leave that, my Lord, till it is found for me.

VISCOUNT HALDANE: It may not arise, Mr. Wegenast. MR. WEGENAST: I think it said in so many words that your Lordships construed that as an enabling section.

VISCOUNT HALDANE: That is the passage I want to see. The question was not before us. MR. WEGENAST: There is, of course, the passage on page 340 to which your Lordship referred, near the middle of the page: "But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies, the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers." That is not the passage I had in my mind, but that covers the same ground.

VISCOUNT HALDANE: But that is merely the power to interfere with trade and commerce. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: That does not touch the question we are discussing now. "For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade." That assumes they have the power and status. MR. WEGENAST: I am sorry I cannot lay my hands on the passage for the moment. Perhaps, however, I may leave the matter for a little while.

VISCOUNT HALDANE: I think it is very unlikely that Lord Sumner and I committed ourselves to a proposition of that kind. MR. WEGENAST: Your Lordship did say that the John Deere Plow Company was a company which the Dominion alone could incorporate.

VISCOUNT HALDANE: Yes, clearly and obviously so, but we did not say that the Dominion could not put in statutory restrictions. MR. WEGENAST: No, my Lord.

VISCOUNT HALDANE: It may be that the true construction of section 29 is that you are to read the charter as if it were a Statute, in which case the rule of construction in *Ashbury Carriage Company* v. *Riche* would apply. MR. WEGENAST: It is not vital to my case, my Lord, but your Lordship in the Bonanza case has pointed out that the opposite rule should be applied.

VISCOUNT HALDANE: We were dealing with an Ontario case there. MR. WEGENAST: Yes, that is so, my Lord.

VISCOUNT HALDANE: We were dealing with a Dominion company. You may be right, or this point may not arise. MR. WEGENAST: Yes, my Lord. Well, I think it does arise as a matter of fact, but because the matter came up I wanted to point to the passage dealing with it.

Now, my Lord, there is the further provision. It preceded the one which I read to your Lordship in section 29, but logically, I think it succeeds it, the provision which enables the company to hold land; the beginning of section 29: "The company may acquire, hold, mortgage, sell and convey any real estate requisite for the carrying on of the undertaking of the company."

VISCOUNT HALDANE: Now, in what case did we deal with that subject? MR. WALLACE NESBITT: In the Colonial Building Association, my Lord.

MR. WEGENAST: In the Citizens and Parsons' case it was first stated, and then it was qualified in the Colonial Building Association case, and it was stated it was only used as an illustration. In the John Deere Plow case your Lordship said it was subject to provincial law dealing with the question of mortmain.

VISCOUNT HALDANE: So that you cannot read that unrestrictively. MR. WEGENAST: I do want to refer your Lordships at this stage, if I may, because I think it is illuminating, and it is one way of putting my argument—a very brief and clear way—to the original of this company's act in 1864. Chapter 23 of the Statute of 1864. This Act was before your Lordship very much in the Bonanza case.

VISCOUNT HALDANE: No doubt it was. MR. WEGENAST: And the provision there is more on the lines of the provisions of the Imperial Act in its concession of powers. It provided in section 4: "Every company so incorporated by letters patent under the Great Seal, for any of the purposes mentioned in this Act, shall be a body corporate by the name contained in the letters patent, capable forthwith of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament, and having perpetual succession and a common seal with power to acquire, hold, alienate and convey any real estate necessary or requisite for the carrying on of its operations," and the rest is not in point.

VISCOUNT HALDANE: That is in your favour because there again is the reference to the special Act of Parliament, but undoubtedly we did hold in the last case that the Province of Canada could through its Governor grant charters with the Sutton Hospital case powers. MR. WEGENAST: I may deal with that afterwards my Lord, but the one point I want to make now is that one way of putting our case was: what concrete powers, if any, formerly exercised by the Parliament of Canada now survive to the Parliament of the Dominion.

VISCOUNT HALDANE: I should like to look at that 1864 Companies Act. It is materially in your favour. MR. WEGENAST: It is illuminating I submit, my Lord, because when you get at the disjunctions and when you take that section apart and assign one part to the province and the other to the Dominion then you have our question answered in this case.

VISCOUNT HALDANE: Which chapter is it? MR. WEGENAST: Chapter 23, my Lord.

VISCOUNT HALDANE: I think it is only dealing with mining companies. MR. WEGENAST: No, my Lord, it is all commercial companies. That is the original of this Companies Act.

VISCOUNT HALDANE: Mine is headed: "An Act to authorize the granting of charters of incorporation to manufacturing mining and other companies." It is a wrong heading in the pages. MR. WEGENAST: Your Lordships will find in section 1 a long list of the different kinds of companies that can be incorporated under this Act.

VISCOUNT HALDANE: We shall get confused unless we get this clear. What we held in the Bonanza case was this: that there had been under this Act of 1864 power in the Governor-General, or rather the Governor of the United Provinces of Canada, which was an executive power exercisable as part of the prerogative delegated to them. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: When by charter under the Great Seal of the province they incorporated a company it was a company with a common law status. That we held. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Then we said that when the executive power was distributed under the British North America Act of 1867, so much as was appropriate to the Dominion passed to the Governor-General and so much as was appropriate to the province passed to the Provincial Governor. Then we said it might be the Province of Ontario could have legislated so as to substitute for that prerogative way of incorporation another way, but we said the Province of Ontario has not done so, and, therefore, you must look at the Act of 1864 and see what, under the distribution contained in the Act of 1867, has passed to the executive of the province, and we measured that power by this Act, so that it is very important to remember this because if we held in that case that the reference to the special Act did not abrogate the scope of the common law status then it remains. MR. WEGENAST: Well, of course, we would not say, my Lord, get the powers one way or the other, either by special Act or by charter.

VISCOUNT HALDANE: Quite possibly, but I understand you to be saying that it was important to you that the Dominion company should have the same full status that the Bonanza Company had? MR. WEGENAST: No, my Lord, I

was not thinking of that. It was rather as a way of putting my case. One casts about for a clear distinct way of putting one's case, and one way I have of putting my case is that it is necessary for your Lordships to see what the disjunctions of that very section are. This section was in force before Confederation. Now, we come to the two questions: Can the Dominion give that to this company; we say yes, that is the power, we say, only by Statute; then can the Dominion give that to this company, yes; the power to hold land and personal property, we say yes.

VISCOUNT HALDANE: These are all common law powers. MR. WEGENAST: Yes, my Lord, that is so. I had not thought of it in that light. But I have already referred to the section in Coke's notes to the Sutton Hospital case, which are all laid out as being incidental to the very conception of a corporation.

VISCOUNT HALDANE: My recollection is that he says the corporation is like a magical person, and had to be looked upon as such. MR. WEGENAST: That is in the Sutton Hospital case, but I am referring to the notes to the report, where it discusses the nature of a corporation and gives an instance. There are practically collected from Coke, and the passage in the Interpretation Act I inferred was by way of making the law of the Province of Quebec perhaps square with that.

VISCOUNT HALDANE: Just let us run quickly through this and be done with it. The Act of 1864 is: "The Governor-in-Council may, by letters patent under the Great Seal of the province, grant a charter of incorporation to any number of persons not less than five, who shall petition therefor, and constitute such persons and others who may become shareholders in such company, a body corporate and politic, for any of the following purposes," and then it sets out the purposes and then says: "and such charter of incorporation may be granted to any one company for any two or more of the purposes mentioned in the paragraphs," and then you have to set out the names of the applicants. Then there are the preliminary conditions as to fees and so on and as to capital. Then in section 4: "Every company so incorporated by letters patent under the Great Seal, for any of the purposes mentioned in this Act, shall be a body corporate by the name contained in the letters patent, capable forthwith of exercising all the functions of an incorporated company, as if incorporated by a special Act of Parliament." Well, somewhere you say we said, and we must have said it, I think, that these were not words of derogation, but words of increase. MR. WEGENAST: That is what I submitted, my Lord.

VISCOUNT HALDANE: But where we said it you have not yet found. MR. WEGENAST: No, my Lord.

VISCOUNT HALDANE: But I think it is implied in the Bonanza case. MR. WEGENAST: It may be so, my Lord.

VISCOUNT HALDANE: Then there are restrictions. Which is the section as to powers? MR. WEGENAST: Section 4, my Lord.

VISCOUNT HALDANE: Very well then. This is substantially the same as the Dominion Act, according to you. MR. WEGENAST: Yes, my Lord, and I simply point to it by way of demonstrating the difficulty. May I say this also, my Lords. This was pointed out in the Bonanza case that for several years after Conferedation the Province of Ontario incorporated companies under this very Act.

MR. WALLACE NESBITT: It is at the top of page 582 that it refers to it as being an enabling Act. That is in the Bonanza case, at the top of page 582, where it is dealing with section 4: "Their Lordships construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions."

MR. WEGENAST: Yes, my Lord. Apparently I was mistaken in the case. The point I had in my mind is in the Bonanza case.

VISCOUNT HALDANE: Now, we must compare the words of section 4 with the words of section 29 of the Canadian Companies Act. MR. WEGENAST: Yes, my Lord, section 4 of the old Act embodies more than section 29 at present does.

VISCOUNT HALDANE: I want to compare them. This sets out whatever those who prepared this case thought material, but it was not what we are on just now; we want the whole section. Section 29 of the Companies Act I have got now and we can compare them. MR. WEGENAST: Shall I read one of them, my Lord.

VISCOUNT HALDANE: You had better read the 1864 Act, section 4. MR. WEGENAST: "Every company so incorporated by letters patent under the Great Seal, for any of the purposes mentioned in this Act shall be a body corporate by the name contained in the letters patent, capable forthwith of exercising all the functions of an incorporated company, as if incorporated by a special Act of Parliament, and having perpetual succession and a common seal with power to acquire, hold, alienate and convey any real estate necessary to requisite for the carrying on of its operation; and the said letters patent shall be conclusive evidence that all the requisitions of this Act have been complied with." The rest is adjective law.

VISCOUNT HALDANE: Now, you have read that as covering the ground, not only of section 29, but of section 5. MR. WEGENAST: Yes, my Lord, and section 30 of the Interpretation Act.

VISCOUNT HALDANE: We will come to that later, but we will take section 5. "The Secretary of State may, by letters patent under his seal of office, grant a charter to any number of persons, not less than five, who apply therefor, constituting such persons, and others who have become subscribers to the memorandum of agreement herein after mentioned, and who thereafter become shareholders in the company created, a body corporate and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, except the construction and working of railways or of telegraph or telephone lines, the business of insurance, the business of a loan company and the business of banking and the issue of paper money." Is there any contest that these two sections between them gives as much—what do you say to that Mr. Nesbitt—as much as is contained in the section of the Act of 1864. MR. WALLACE NESBITT: I had not thought of it, my Lord, for the simple reason that I am bound to say I do not think any of this discussion has the least bearing on what your Lordships have before you. I had not thought of it, and I do not think it has the least bearing.

VISCOUNT HALDANE: Then it is not necessary for us to come to any conclusion about this? MR. WALLACE NESBITT: No, my Lord.

VISCOUNT HALDANE: Do you say there is a conflict between the two? MR. WALLACE NESBITT: I have not thought of it in that light, my Lord. We say they are entitled to hold land subject to the Colonial Acts, if the provincial law allows it. There is no dispute about that. All my friend is claiming is that his charter gives him a right to hold land, and we say yes, if you take out a license in Mortmain for which you pay 100 dollars.

MR. WEGENAST: That is my learned friend's way of putting his case. Our submission is that there is a most direct conflict, and it consists in this. The question is: Whether the Dominion under section 29 and section 30 of the Interpretation Act, can give to its creatures anything more than the metaphysical attributes of a corporation; whether there is any actual outgoing power; anything to which the company can appeal if its actions are challenged.

VISCOUNT HALDANE: That abstract question is not arguable under powers to regulate trade and commerce. It was held in the John Deere Plow Company's case you could get large powers. MR. WEGENAST: In the lower Courts, my Lord, I have judgment after judgment against me on that very point.

VISCOUNT HALDANE: Do you contend that the Dominion of Canada could not by charter under the Dominion Companies Act grant large powers to a company of this kind? MR. WALLACE NESBITT: No, my Lord.

VISCOUNT HALDANE: To trade all over Canada. MR. WALLACE NESBITT: No, my Lord.

VISCOUNT HALDANE: Now you are relieved Mr. Wegenast. MR. WEGENAST: Yes, my Lord.

MR. WALLACE NESBITT: We say you must pay a small tax to us before you trade. That is the whole point, my Lord.

LORD PARMOOR: Your whole point is whether that tax can be imposed by the Provincial Government. MR. WALLACE NESBITT: Yes. There is no doubt it can be imposed. The question is whether we have a right to impose it in the form of a license—as an evidence of payment of the tax.

VISCOUNT CAVE: Your Statutes differ from those which we construed in the John Deere Plow Company's case. MR. WALLACE NESBITT: Yes, my Lord.

VISCOUNT CAVE: We should like to know how they differ. MR. WEGENAST: My learned friend has stated it.

VISCOUNT HALDANE: You have now to differentiate it. You have now got very near to the point of the case. MR. WEGENAST: The whole question resolves itself into this; whether these are taxation Acts. We do not deny the power of the province to tax or to tax by way of a license, but we say these Statutes do more than that. We say they are not taxation Acts in the first place, not even *prima facie*.

VISCOUNT HALDANE: We have now got to the point at which we should know exactly what the Provincial Statutes do. MR. WEGENAST: Now, my Lord may I refer to the Saskatchewan Act.

VISCOUNT CAVE: We might have first of all the British Columbia Act which was construed in the John Deere Plow Company's case. MR. WEGENAST: That is before your Lordships.

VISCOUNT HALDANE: Shall we take the British Columbia Act first of all?

VISCOUNT CAVE: It is quite short I think.

MR. WEGENAST: May I read the Saskatchewan Act first of all.

VISCOUNT HALDANE: Have you read the judgment in the John Deere Plow Company's case? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: What was the issue in the John Deere Plow Company's case? What did the province try to do? MR. WEGENAST: They asked the company to take out a license before it could carry on business in the province.

MR. WALLACE NESBITT: No, my Lord, they refused to grant a license unless they would change their name.

VISCOUNT HALDANE: They objected to the name. MR. WALLACE NESBITT: Yes, my Lord.

MR. WEGENAST: That was not the issue, and the judgment was not put on anything like that ground.

VISCOUNT HALDANE: We had better find out what the John Deere Plow Company's case decided first of all. MR. WEGENAST: May I read the issue as placed then.

VISCOUNT HALDANE: First it must be registered as an extra-provincial authority, and apparently a license was granted to enable it to issue and hold land in the province. Then at page 336: "An extra-provincial company, if duly incorporated by the laws of, among other authorities, the Dominion, and if duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the Provincial Legislature extends, may obtain from the registrar a license to carry on business with the province on complying with the provisions of the Act and paying the proper fees." That is to say a Dominion company could not carry on the business within the province without a license. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Then: "If such a company carries on business without a license, it is liable to penalties, and the agents who act for it are similarly made liable, and the company cannot sue in the Courts of the province in respect of contracts made within the province. The Registrar may refuse a license when the name of the company is identical." That was held bad.

VISCOUNT CAVE: Now, may we have the Ontario Statute. MR. WEGENAST: That is before your Lordship in the rear of the book which has blue covers, section 7 on page 99. There are two Acts in that same cover.

VISCOUNT HALDANE: I have page 99: It is "An Act respecting the licensing of extra-provincial corporations." MR. WEGENAST: Yes, my Lord, and then section 7 is the section your Lordship will find following verbatim the British Columbia Act—or at any rate which was followed verbatim by the British Columbia Act. It is on page 99 of this blue covered pamphlet.

VISCOUNT HALDANE: What is the date of this Act? MR. WEGENAST: This is from the Revised Statutes of Ontario, 1914, but it was originally passed in 1900.

VISCOUNT HALDANE: That is the same as the British Columbia Act. MR. WEGENAST: Yes, just the same as the British Columbia Act.

VISCOUNT HALDANE: Then we will look at it and be done with it. MR. WEGENAST: It provides in section 7 that "no extra-provincial corporation coming within class 7, 8, or 9 shall carry on within Ontario any of its business unless and until a license under this Act so to do has been granted to it, and unless such license is in force; and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial corporation, carry on any of its business in Ontario, and until such corporation has received such license, and unless such license is in force."

VISCOUNT HALDANE: Now, there you have a direct challange to the status. MR. WEGENAST: Yes, my Lord, that is what I claim.

VISCOUNT HALDANE: Apparently it is the same in the British Columbia Act. MR. WEGENAST: Yes, but my friend says the British Columbia case was decided on the narrow ground, that in that case the application had been made for registration and it had been refused. Now the issue was not that. We did not ask for a mandamus to be issued. We said we did not need a license. If the question of name had been the issue our proper remedy would have been a mandamus against the Registrar in which we could have said this section of the British Columbia is invalid and you must register us.

VISCOUNT HALDANE: My recollection is that the principle of the judgment was this: The Dominion Parliament has given a status to this Dominion company. The Legislature of British Columbia has directly challenged that statement. Now, has it validly done so? That is the question. MR. WEGENAST: Yes, my Lord, but in the lower Courts there is judgment after judgment against me holding that the issue in the John Deere Plow Company's case was this question of name.

VISCOUNT HALDANE: I do not think Mr. Nesbitt says that now. MR. WALLACE NESBITT: I shall argue, of course, that that was the real point that was up for decision, because all that your Lordships have suggested is that the Statutes in the form in which they are now found are *ultra vires,* and our contention is that these Statutes are so different in form.

VISCOUNT HALDANE: Yes, but with regard to the Statute as it stood, which I suppose covers the Ontario Act too, you do challenge the status conferred by the Dominion. You said the Dominion company is not to trade at all. MR. WALLACE NESBITT: In that particular case they challenged the status, because the application was for the John Deere Plow Company to be licensed, and they said No, we will not license the John Deere Plow Company; you must change your name. We say the point of that as to the license is, we think, absolutely covered by the decision in your Lordship's Board in the Brewers and Malsters case, where they said: License authorized by the Dominion to sell wholesale, liquor, and authorized to brew—you may carry on that business. You may have the privilege of carrying on that business, provided you pay us 100 dollars tax, the evidence of that payment being the license, so that we shall be able to know that you have paid. Now, all that we say in this case just on that section 7 is this. All that we have done, and all that we have purported to do is to say: Certainly you may exercise every power the Dominion has given you, you being resident here. You may exercise many of them without that, but you may exercise every power you please, the moment you pay us 35 dollars in stamps, in most cases, but in the ultimate result 135 dollars for any company, and we ask you to pay that tax, taking your license in the form of a receipt. Now, that is really all there is in it, my Lord.

VISCOUNT HALDANE: It is direct taxation. MR. WALLACE NESBITT: Yes, we think it is covered absolutely by the decision of this Board in the Brewers and Maltsters case.

VISCOUNT HALDANE: You do not challenge under the head of Civil Rights, the status of the company? MR. WALLACE NESBITT: No. my Lord; they have the most absolute power to exercise every function given.

VISCOUNT HALDANE: But you did in the John Deere Plow Company's case. MR. WALLACE NESBITT: Yes, my Lord, and also there were provisions under the British Columbia Act, which if your Lordships please I will deal with when we come to it—that very much hampered, which were very different to these.

VISCOUNT HALDANE: I think we had better see that.

LORD PARMOOR: I understand all you say is that they have all the powers the Dominion Act purports to give them, they must be subject to your right of taxation. MR. WALLACE NESBITT: Yes, and that taxation is evidence in the form of a license. In that way all that this case amounts to is, if you decide against us—all we have to do is to say: you may come in, and we will collect the money, not from the Provincial Secretary, but through the sheriff. It is just a question of when they pay it.

VISCOUNT CAVE: Do you say the license could not be refused? MR. WALLACE NESBITT: We cannot refuse the license if they tender their 35 dollars. The Act is absolute as to section 5.

VISCOUNT HALDANE: Section 5 of what? MR. WALLACE NESBITT: Section 5 of the Ontario Act. Also section 9, sub-section 2.

VISCOUNT HALDANE: It is the same Act that has been successfully challenged on the general question of status. MR. WALLACE NESBITT: No. my Lord.

VISCOUNT HALDANE: I quite understand you say; no, but the British Columbia Act we are told repeats the language of this Act, and, as I just pointed out, there are provisions in this which go very far: "No extra-provincial corporation coming within class 7, 8 or 9 shall carry on within Ontario, any of its business unless and until a license under this Act so to do has been granted to it, and unless such license is in force." MR. WALLACE NESBITT: You have to look at section 5 first of all, my Lord. That is: "A corporation coming within class 7 or 8." You distinguish between coming within 7 or 8 or 9. For instance an American company or a British company is quite distinct from a Dominion company.

VISCOUNT HALDANE: Are they 7 and 8? MR. WALLACE NESBITT: Yes, my Lord, 8 covers Dominion corporations created by or under the authority of an Act of the Dominion of Canada and authorized to carry on business in Ontario. That is class 8, and then section 5 is: 'A corporation coming within class 7 or 8 shall, upon complying with the provisions of this Act and the regulations receive a license to carry on its business and exercise its powers in Ontario." Then sub-section 2, section 9 is: "No limitations or conditions shall be included in any such license which would limit the rights of a corporation coming within class 7 or 8, to carry on in Ontario." It differs entirely from the British Columbia Act. If you pay your 35 dollars you are entitled to exercise every power that the Dominion has given you.

VISCOUNT HALDANE: It is quite true that these sections say in effect that the Dominion company is entitled on complying with the provisions of this Act to receive a license whatever these provisions are, and we have not seen them yet, and it cannot carry on business till it does. Now what are those provisions? MR. WALLACE NESBITT: The provisions shortly stated my Lord are these. They have to apply stating the name of their corporation and what the charter is.

VISCOUNT HALDANE: Where is that? MR. WALLACE NESBITT: Those are in the regulations. They are in "M" if you look in this book.

VISCOUNT HALDANE: I want to see them in the Act of Parliament. MR. WALLACE NESBITT: They are not in the Act of Parliament, my Lord, they are regulations by the Governor-in-Council.

VISCOUNT HALDANE: Then what are the provisions of this Act which are referred to here? MR. WALLACE NESBITT: It is section 10, my Lord.

MR. WEGENAST: They include the section which authorizes the making of regulations by Order-in-Council.

VISCOUNT HALDANE: Is there any other section that matters? MR. WEGANAST: There is nothing of any serious consequence, my Lord, except one with regard to the power to hold land.

VISCOUNT HALDANE: I see one material thing in section 15: "A Governor-in-Council may suspend or revoke such license in whole or in part" for default. MR. WEGENAST: Yes, my Lord, that is so.

VISCOUNT HALDANE: That is important for you. SIR JOHN SIMON: It is the Lieutenant-Governor-in-Council, my Lord.

VISCOUNT HALDANE: Yes, I should have said the Lieutenant-Governor-in-Council. MR. WALLACE NESBITT: Those are not Dominion corporations. If you

will turn back Chief Justice Meredith makes that quite plain that those refer to the other outside corporations.

VISCOUNT HALDANE: They are perfectly general, Mr. Nesbitt. MR. WALLACE NESBITT: Yes, my Lord, but on a careful reading of the Statute I think you will see it shows that.

VISCOUNT HALDANE: It requires very careful reading indeed to get out of these words. MR. WALLACE NESBITT: It says: that they may be for non-observance or non-compliance with the limitations and conditions, and as there cannot be any Dominion corporation limitations and conditions it cannot apply to them.

VISCOUNT HALDANE: Why do you say they cannot? SIR JOHN SIMON: It refers to section 14, as a matter of fact.

VISCOUNT HALDANE: Yes, you have also under section 14 to send in returns. MR. WALLACE NESBITT: These are covered by the John Deere Plow judgment. Your Lordships say we can certainly regulate that type of company.

VISCOUNT HALDANE: Yes, that is quite true, but it is one thing to say you may enforce, and another thing to say you cannot make them a condition of the right to trade. MR. WALLACE NESBITT: I quite appreciate that, my Lord. I do not want to interrupt my learned friend's argument very much.

VISCOUNT HALDANE: I do not think Mr. Wegenast objects. MR. WEGENAST: Now, my Lord, may I call your Lordships' attention to the fact that the regulations framed under the Ontario Act do contain the very section which was discussed in the John Deere Plow Company's case relating to the name of the company.

VISCOUNT HALDANE: Where is that? MR. WEGENAST: That is on page 31 of the collection of documents called "M."

VISCOUNT HALDANE: You mean in the regulations? MR. WEGENAST: Yes, my Lord, the regulations made by Order-in-Council under this Act.

MR. WALLACE NESBITT: Yes, but that does not refer to Dominion companies if you turn to page 33. It is another subject matter.

MR. WEGENAST: No, not at all. If your Lordships will notice near the middle of that page—

VISCOUNT HALDANE: Where do I find that? MR. WEGENAST: It is in the other book, my Lord.

SIR JOHN SIMON: You will find some tables with different letters of the alphabet on them, and if you will take the tab marked "M" there begins at that point a number of pages paged consecutively which will go to page 31 where you will find the page.

MR. WALLACE NESBITT: But page 31 has no application here. It is page 33.

SIR JOHN SIMON: I am only saying it is what my friend is referring to.

MR. WEGENAST: Your Lordships will find there the very section.

VISCOUNT HALDANE: These are Ontario regulations? MR. WEGENAST: Yes, my Lord, the regulations under the Ontario Act, and they follow word for word the British Columbia section. At least the British Columbia section is manifestly copied from this, but incorporated or read in the Act instead of being left to be done by regulation. It provides: "That the corporate name of the corporation is not on any public grounds objectionable, and that it is not that of any known company, incorporated or unincorporated, or of any partnership or individual doing business in Ontario, or a name under which any known business is being carried on in Ontario, or so nearly resembling the same as to deceive.' MR. WALLACE NESBITT: It does not apply. If you will turn to page 33 you will see a separate set of regulations. The next page shows we have a separate set of regulations in reference to Dominion companies: "Licenses to Dominion companies." There is no such provision because we cannot make it.

MR. WENDERGAST: I stand corrected; but I do refer to the sections dealing with licenses in Mortmain on page 37.

VISCOUNT HALDANE: Please let us finish what we are dealing with first of all. Page 33, Mr. Nesbitt says, exempts a Dominion company from what you have read. MR. WEGENAST: Yes, my Lord.

VISCOUNT CAVE: Do you agree with that? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Where is it? MR. WEGENAST: On page 33.

VISCOUNT HALDANE: I want the exemption. SIR JOHN SIMON: I am sorry to interrupt, but I think there is some misunderstanding here.

MR. WALLACE NESBITT: We do not pretend to put 31 into force *qua* the Dominion companies.

VISCOUNT CAVE: It applies to all. SIR JOHN SIMON: Not only that, but if you take the very same page 31 and read those regulations under different headings and then turn over to page 32 after you have had 20 paragraphs consecutively numbered and passed 2 more lines then on page 32 at line 17 come these words: "If the application be on behalf of a corporation incorporated under the laws of the Dominion of Canada." What is the sense of saying that unless the regulations in front of that refer to the same cases.

MR. WALLACE NESBITT: And then it says: "A company applying for a license." I only know that 33 applies to Dominion companies, and the other is supposed not to.

SIR JOHN SIMON: Exactly the same thing happens on the top of page 33.

VISCOUNT HALDANE: Let us follow this out. It seems plain Mr. Nesbitt, that *prima facie* licenses to provincial corporations on page 31 apply to Dominion corporations. Is not that so? There must be something else which cuts down the effect of that? MR. WALLACE NESBITT: If they attempted to do it the regulations would be *ultra vires* of the Act because the Act did not authorize it, but expressly says there shall be nothing of the sort.

VISCOUNT HALDANE: What does the Act say? MR. WALLACE NESBITT: Sub-section 2 of section 9 says that there shall be no limitations or conditions, and section 5 says they may get a license on application.

VISCOUNT CAGE: It only refers to conditions in the license; it does not refer in terms to preliminaries.

MR. WALLACE NESBITT: Sub-section 5 says you may get a license on payment of the fee, and you must not put any limitation or conditions in the license; it is you shall get it, not that you may get it.

MR. WEGENAST: There is nothing to show there may not be limitations and conditions in the license.

MR. WALLACE NESBITT: Then comes section 6 which provides for American corporation and so on such as were up in the *International Textbook Company* v. *Brown*. Section 6 provides in clause 9 what are American corporations. Perhaps your Lordship would rather hear me in a connected way upon this case rather than by interrupting.

(Adjourned for a short time).

VISCOUNT HALDANE: Would it be a convenient plan that you should call our attention to the Manitoba-Saskatchewan case, and then read the judgments. Then we shall know what the points are. MR. WEGENAST: Yes. The judgments of the lower Courts?

VISCOUNT HALDANE: All the judgments so that we may know what views have been taken. MR. WEGENAST: I thought of reading a portion of the John Deere Plow case.

VISCOUNT HALDANE: You will come better to that, will you not, in connection with the judgments? We shall have a pretty good conception of what was in the John Deere Plow case when we have looked at these two Statutes. MR. WEGENAST: If your Lordship pleases. May I ask your Lordships indulgence afterwards to pick up the thread of my argument?

VISCOUNT HALDANE: Yes. It is our practice to have the judgments read as early as possible, because they focus the points. The judgments do not prejudice us. MR. WEGENAST: If your Lordships please. I should like to refer to the provisions of the Saskatchewan Act.

VISCOUNT CAVE: Why not the Manitoba Act; it is earlier in date. MR. WEGENAST: For the purpose of my argument the logic of these Acts follows more smoothly in the way I suggest, but if your Lordships wish to have the Manitoba Act first, I will refer to it.

VISCOUNT HALDANE: We would like to have the 1909 Act. MR. WEGENAST: If your Lordship pleases.

VISCOUNT HALDANE: Is that the Revised Statutes of Manitoba, 1913, chapter 35? MR. WEGENAST: Yes.

VISCOUNT HALDANE: When was that passed? MR. WEGENAST: In 1909. Will your Lordship look at section 106 first? May I say that this Act of Manitoba is in terms almost identical with the Ontario Act.

VISCOUNT HALDANE: Companies are incorporated in the same way by letters patent. MR. WEGENAST: Yes. Section 106 defines a corporation: "In this part, except where the test requires otherwise, the expression 'corporation' means a company, institution, or corporation, created otherwise than by or under the authority of an Act of the Legislature of Manitoba." It is in part 4, which deals with: "Extra-provincial corporations."

VISCOUNT HALDANE: Does the first part include Dominion companies? I do not see anything about them. MR. WEGENAST: It includes all companies except those incorporated by the Legislature of Manitoba.

VISCOUNT HALDANE: Are the Dominion companies included in the category of companies not requiring a license? MR. WEGENAST: No, it is section 108.

VISCOUNT HALDANE: Did Dominion companies require a license? MR. WEGENAST: Yes, they are thrown in the same category as American companies and foreign companies generally.

VISCOUNT HALDANE: That is Class V. MR. WEGENAST: Yes. Then in clause 118 your Lordship will find the prohibition copied from the Ontario Act: "No corporation coming within Class V. or VI., shall carry on within Manitoba any of its business unless and until a license under this part so to do has been granted to it, and unless such license is in force, and no company, firm, broker, agent or other person, shall, as the representative, or agent of or acting in any other capacity for any such corporation, carry on any of its business in Manitoba unless and until such corporation has received such license and unless such license is in force." Then there is a proviso.

VISCOUNT HALDANE: Is not that almost the same as the British Columbia Act in the John Deere Plow case? MR. WEGENAST: Yes, they are all copied from the parent Act of Ontario.

VISCOUNT HALDANE: The John Deere Plow case was just the same as the Ontario. MR. WEGENAST: Yes, my learned friends point out one or two differences which we say are minor differences and do not go to the essence, but that will appear later.

VISCOUNT HALDANE: This *ultra vires* according to the John Deere Plow case. MR. WEGENAST: We thought so, and we based our whole argument on that.

VISCOUNT HALDANE: The general proposition is that you cannot trade in Manitoba without a license. MR. WEGENAST: Yes.

VISCOUNT HALDANE: That is your case. MR. WEGENAST: That is our case. Then, my Lords sections 122 and 123 provide penalties for carrying on business without a license, heavy recurring penalties of 20 dollars a day in one case, and 50 dollars a day in the other. The company itself is liable to a penalty of 50 dollars a day and its agents to a penalty of 20 dollars a day. The most severe penalty is embodied in the middle of section 122: "and so long as it remains unlicensed under this part it shall not be capable of maintaining any action, suit, or other proceeding in any Court in Manitoba."

VISCOUNT HALDANE: That goes to its status. MR. WEGENAST: If the powers of the Dominion are limited to conferring the metaphysical capabilities this is of the very essence.

VISCOUNT HALDANE: I understand Mr. Nesbitt to contend that this case does not involve such a wide proposition.

VISCOUNT CAVE: I expect he also says they are entitled to a license as a matter of course under section 109. MR. WEGENAST: Yes, and the argument of my learned friend is, unless and until it is licensed, it cannot sue in the Court. Our argument is that the Dominion cannot be prohibited for an hour or a day; it cannot be kept waiting at the door of the province, as it were, for entrance, because in the nature of things it requires some length of time to prepare documents and statements and have them proved.

LORD PARMOOR: Supposing the company were carrying on its business would you admit that in the matter of taxation the Provincial Government might tax the company so carrying on its business under the Dominion Statute? MR. WEGENAST: There is no question about that. What we object to is the mixing up of the status and taxation.

LORD PARMOOR: Anything which would prevent the Dominion company carrying on its business, but in the position in which it can carry on its business must be regulated. MR. WEGENAST: The issue may appear in some respects academic, but I should like to suggest in a word why this is of such practical importance to us. The Dominion company sell a bale of goods, as was the case in the Duck case, that was before your Lordships along with the Wharton case; the company does not know at what stage it comes within the ambit of the Provincial Act. Supposing it does business through a merchant's broker or a jobber, is that carrying on business in the province? The penalty for making a mistake is outlawry. That is why those whom I represent object to this class of law. We object to the mixing up of the corporate status or to adding any question of corporate status to a case of non-payment of tax.

VISCOUNT HALDANE: We have never had clearly yet what the practical issue in this case is. Are you called upon to pay a tax or what? What do you object to? MR. WEGENAST: We object to having a corporate status conferred by the Dominion challenged by the province.

VISCOUNT HALDANE: How do they challenge it? Are they asking you to pay a tax or what? MR. WEGENAST: They are asking us to pay a royalty for re-incorporation practically; in form it may be a license.

VISCOUNT HALDANE: What they are claiming to do is to make you take out a license? MR. WEGENAST: In Saskatchewan they are asking us to put ourselves entirely into the mould of the Provincial Companies Act and to do exactly the same thing as if we were incorporated under the Provincial Acts.

VISCOUNT HALDANE: To take out a license? MR. WEGENAST: To register. In Saskatchewan incorporation is by registration just as in the Imperial Act.

VISCOUNT HALDANE: You are appearing here for whom? MR. WEGENAST: For the five appellant companies.

VISCOUNT HALDANE: Mr. Nesbitt is appearing for Manitoba and Ontario? MR. WEGENAST: Yes.

VISCOUNT HALDANE: Mr. Henn Collins for Saskatchewan? MR. WEGENAST: Yes.

VISCOUNT HALDANE: What is Mr. Nesbitt asking you to do? MR. NESBITT: To pay 35 dollars as a minimum, and 135 dollars as a maximum.

VISCOUNT HALDANE: Is that a tax? MR. NESBITT: Yes. Then they can do anything they please.

VISCOUNT HALDANE: You have to deal with that. They say that under the power of indirect taxation they may impose a tax upon you. MR. WEGENAST: Yes. Before coming to the Saskatchewan Act there are several more sections of the Manitoba Act to which I want to refer your Lordships. Section 119 is: "No company, corporation, or other institution not incorporated under the provisions of the Statutes of this province, shall be capable of acquiring, holding, mortgaging, alienating, or otherwise disposing of or lending money on the security of any real estate within the province, unless under license issued under any Statute of this province in that behalf."

VISCOUNT HALDANE: It may be that is quite *ultra vires* and does not touch Mr. Nesbitt's case. He may be entitled to put the tax in the form of a license duty. MR. WEGENAST: We say it is not valid in the form it is put.

VISCOUNT HALDANE: The form in which it stands here? MR. WEGENAST: Yes.

VISCOUNT HALDANE: I am not sure that Mr. Nesbitt says that it is. It may be that the John Deere Plow case is in his way. MR. WEGENAST: I thought so, but that is the question before your Lordships. Your Lordships will notice it is in the same language as in the case of the power to sue, the words are: "No company . . . shall be capable," and so on.

VISCOUNT HALDANE: We appreciate all that. MR. WEGENAST: Then section 112. I am taking these sections in what I take to be the logical order: "A corporation receiving a license under this part may, subject to the limitations and conditions of the license, and subject to the provisions of its own charter, Act of incorporation, or other creating instrument, acquire, hold, mortgage, alienate, and otherwise dispose of real estate in Manitoba and any interest therein to the same extent and for the same purposes and subject to the same conditions and limitations as if such corporation had been incorporated under Part 1 of this Act."

VISCOUNT HALDANE: That may or may not be valid, but it does not touch Mr. Nesbitt's point. MR. WEGENAST: The point was much broader in the lower Courts.

VISCOUNT HALDANE: Then we must look at the pleadings and the proceedings to see what the point is. MR. WEGENAST: May I finish the section here?

VISCOUNT CAVE: I think it must be broader because in some cases a shareholder has brought an action against your company to restrain you from carrying on any business at all without taking out a license. MR. WEGENAST: Yes.

VISCOUNT HALDANE: It may well be in that case it arises but that is not the case in which Mr. Nesbitt is appearing. Mr. Nesbitt, who are your clients here? Are you appearing for the shareholders? MR. NESBITT: No, my Lord, I am appearing for the Government. Mr. Bovill Clarke is appearing for the shareholders.

MR. WEGENAST: Then I come to section 113. "The powers of any corporation, licensed under the provisions of this part, with respect to acquiring and holding real estate, shall be limited in its license to such annual or actual value as may be deemed proper."

VISCOUNT HALDANE: I think somebody said that the Mortmain Acts were within the capacity of the province. MR. WEGENAST: If this is Mortmain legislation. Your Lordship remembers the expression of Sir Barnes Peacock in the Hodge case, that things which may in one aspect fall under one sub-head may fall under another in another aspect. We say the predominant consideration here is corporate capacity.

VISCOUNT HALDANE: It may be or may not be if the province choose to say no corporation is to hold more than a certain amount of land in their province why is that not mortmain. MR. WEGENAST: If that were the legislation.

VISCOUNT HALDANE: Does not that apply to all corporations? It applies to all corporations, does it not? MR. WEGENAST: The words of section 113 are: "As may be deemed proper." There may be very wide questions of fact arising there. Supposing the province thought it proper that a Dominion bank or a Dominion railway company should only hold a certain amount of land; supposing the province undertook to say what should be proper in the case of Dominion corporations then grave questions might arise which might be regarded as questions of fact, but which would nevertheless raise very difficult questions as to the precise limit of the Dominion power. What we say generally is that it would not be competent to the province to prevent a Dominion company from holding such lands as are necessary for the carrying out of its undertaking. It must obviously have an office, and it would not be competent for the province to say you shall not hold any land.

VISCOUNT HALDANE: It may be competent to the province to say as to the extent. MR. WEGENAST: Yes, it would be quite consistent with our argument to say that the province should say no corporation shall hold land except for a limited period. They might institute a jubilee system such as the Jews had, of letting the lands revert periodically to the Crown.

VISCOUNT HALDANE: We shall see whether this arises. I should be very loath to define the limits within which the Mortmain Legislation is competent. MR. WEGENAST: All I mean is that this is not Mortmain Legislation. Section 126 deals with the fees which we say are not taxes, but royalties or payment for services for operating the company. If your Lordships care to refer to the Order-in-Council under the Ontario Act you will find the fees are called fees for services, but the provision here is a general one giving the Lieutenant-Governor-in-Council power to fix the fees.

VISCOUNT HALDANE: I think you are entitled to say that that is not a tax but a fee. MR. WEGENAST: That is what I am saying. Your Lordship notes the provision under which the Lieutenant-Governor-in-Council is given the power to reduce the fee having regard to the amount of capital actually employed in the province. I do not know just what one is entitled to state in connection with a case like this, but it is a fact that that section is never called into operation. It is the policy not to allow any deduction, and the fees are always based on the authorized capital of the company. Then sections 109 and 110 provide that the Dominion company shall be entitled to a license.

VISCOUNT HALDANE: "Upon complying with the provisions of this part of the regulations made hereunder." MR. WEGENAST: Yes, section 110 is: "A corporation coming within class 6 may, upon complying with the provisions of this part and the regulations made hereunder, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Manitoba as may be embraced in the license; subject, however, to such limitations and conditions as may be specified in the license." That latter part in my submission is conclusively in our favour, but I should not like to base my argument on narrow grounds.

VISCOUNT HALDANE: You say it is an interference with the status of the company? MR. WEGENAST: Yes. Then there is a provision for suspension and revocation of the license. Section 121 provides: "That the Lieutenant-Governor-in-Council may suspend or revoke such license in whole or in part."

LORD PARMOOR: If it makes default it is obvious they may do that. MR. WEGENAST: On complying with the limitations and conditions in the license whatever they may be.

LORD PARMOOR: Certainly. MR. WEGENAST: Now, my Lords, I will come to the Saskatchewan Act which is the second pamphlet in this connection.

VISCOUNT HALDANE: How does that differ from the ones we have had? MR. WEGENAST: This is based on the Ontario Act in principle. The Saskatchewan Act requires the Dominion company to go through exactly the same process as the local company. It attorns to the jurisdiction of the province and becomes to all intents and purposes a local company.

VISCOUNC HALDANE: That is the principle. MR. WEGENAST: Yes, that is the principle upon which this Act proceeds. Another way of putting it is this. The draftsman treated the Dominion company just like the local companies, that is to say, if the Act was made sufficiently general in its application to companies it would be valid.

VISCOUNT HALDANE: Is there any differentiation in the two sorts of companies? MR. WEGENAST: Your Lordships will find the definition of company in section 3. It means any company incorporated or registered under this Act.

VISCOUNT HALDANE: Then has a Dominion company to be registered in order to become a company under this Act? MR. WEGENAST: Yes.

VISCOUNT CAVE: Which section is it that requires registration? MR. WEGENAST: Section 23.

VISCOUNT HALDANE: I think section 24 is material. MR. WEGENAST: Section 24 is a very peculiar section if I may say so, illustrating the fact, however, that the Act does deal with status and the whole question of corporation law.

VISCOUNT HALDANE: This is an extremely different system. This is not the Bonanza case at all; it is a statutory corporation. MR. WEGENAST: Yes. Since the decision in the Bonanza case, the Province of Saskatchewan, like most other provinces, has passed an Act conferring on all its companies, however incorporated, the power of a common law corporation.

VISCOUNT HALDANE: Applying the Bonanza case to them? MR. WEGENAST: Yes, that has been done in five of the provinces, Saskatchewan being one of them. They have granted affirmatively to all their companies the power of common law corporations in terms, so that the question would not arise, taking advantage of your Lordships' dictum in the Bonanza case that that could be done.

VISCOUNT HALDANE: Certainly we did not advise them to draw their Acts of Parliament in that way. MR. WEGENAST: At all events they did.

VISCOUNT HALDANE: Look at section 23. MR. WEGENAST: "Any company, whether incorporated under the provisions of this Act or otherwise, having gain for its object or part of its object and carrying on business in Saskatchewan, shall be registered under this Act."

VISCOUNT HALDANE: Do we need to look at any more of these sections before we go to the judgments? MR. WEGENAST: Yes, if I may say so, the scheme is not quite before your Lordships yet. I wish to refer to section 25.

VISCOUNT CAVE:—Is not the first part of section 25 important? MR. WEGENAST: Yes, it is important.

VISCOUNT CAVE: It is anyway. MR. WEGENAST: Yes, then further on a provision is made that the Dominion company must be registered. There is that distinction of course in section 24. Sub-section 2 is: "The registrar may, in the case of all companies (other than those incorporated by or under the authority of the Parliament of Canada) or proposed companies, refer the application to the Lieutenant-Governor-in-Council, and may refuse registration at his discretion."

VISCOUNT HALDANE: But not in the case of a Dominion company. MR. WEGENAST: That is so. That is the section there. Under section 25 the company is required to go a step further and to take an annual license. Every company may receive a license. If it carries on business without having a license then under sub-section 5 of section 5, it is subject to a heavy and recurring penalty of 25 dollars a day. It is argued by my learned friends, as I understand it, that the carrying on of a business is not prohibited under that section, and I invite your Lordships to consider that. That section as it stands, we thought, did prohibit and a good deal will turn on that, and I may have to cite authorities in support of our view. We think the answer is it does not lie on us to argue that we are prohibited. We must, however, justify our position.

VISCOUNT HALDANE: You are liable to a penalty anyhow? MR. WEGENAST: There is a penalty of 25 dollars per day, and the carrying on of a business without a license is characterized as an offence.

VISCOUNT HALDANE: You say that affects your status? MR. WEGENAST: Yes. It says that the company carrying on business without a license is guilty of an offence and is subject to a penalty of 25 dollars a day.

VISCOUNT CAVE: The point is you have to get a license, but you cannot be refused it? MR. WEGENAST: That is so.

VISCOUNT CAVE: I suppose that depends on section 24? MR. WEGENAST: Yes, that is the argument on the other side, that is to say, we must apply for registration and a license, and when we do that we come under the terms of the Companies Act and become a provincial company.

VISCOUNT HALDANE: They are entitled to get a license, but they carry on business without it. MR. WEGENAST: That is so.

VISCOUNT CAVE: I suppose it is said on the other side it is a mere way of getting a tax? MR. WEGENAST: But we bring ourselves under all the general provisions of the Companies Act with regard to holding of meetings, and so on. A company is defined throughout to include us. Beyond question this is intended to subject us to the new Statute which defines the status of the local company. If there is any act which regulates the status of a Saskatchewan company this is the Statute, and we are asked to conform and to attorn to this Statute; we are asked to make this our company law, and we must do that in order to have the right to carry on business. It is not the payment of the fee. Then there is this very important provision: Sub-section 3 of section 25 is: "A company receiving a license from the registrar may, subject to the provisions of its charter, Act or other instrument creating it, carry on its business to the same extent as if it had been incorporated under this Act." That is to say, a company includes the local company because the word means the local company after it has become registered, and after it has become licensed; it has the same power as if it had been incorporated under this Act. It runs in a vicious circle.

VISCOUNT HALDANE: It is only a provision giving them a right to tax. That is what they say. MR. WEGENAST: Yes, if this is a tax. Then will your Lordships look at section 4, to which I referred, but did not read: "No company, association or partnership consisting of more than twenty persons shall be formed in Saskatche-

wan for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is incorporated under this Act or by or under some other Act of the Legislature."

VISCOUNT HALDANE: Does that refer to an existing company? MR. WEGENAST: No, but twenty-one persons desiring to take out a charter from the Dominion would be prohibited by that section from doing so.

VISCOUNT HALDANE: It is not clear. Supposing the company had been formed once, why should it be formed over again in Saskatchewan? MR. WEGENAST: That is exactly what I would like to put before your Lordships.

VISCOUNT HALDANE: This says: "No company . . . shall be formed in Saskatchewan," but supposing it has been formed already? MR. WEGENAST: The fact is that the draftsman has not considered all the bearings of what he is attempting to do.

VISCOUNT HALDANE: The question is, do the words cover the case of a Dominion company already incorporated? MR. WEGENAST: Perhaps not a company already incorporated. I cite the passage as showing the intention to deal with status, and cover the case of a Dominion company.

LORD PARMOOR: A "company" means, among other things, a company registered under this Act? MR. WEGENAST: Yes.

LORD PARMOOR: Supposing you had a Dominion company incorporated, can it not be registered under this Act? MR. WEGENAST: Yes.

LORD PARMOOR: It is brought under this Act by its incorporation or status.

VISCOUNT HALDANE: Sub-section 3 is: "A company receiving a license from the Registrar may, subject to the provisions of its charter, Act or other instrument creating it, carry on its business to the same extent as if it had been incorporated under this Act." MR. WEGENAST: Having become incorporated under this Act it is under two laws. It is under the Dominion Companies Act, and it also comes under another Companies Act.

VISCOUNT HALDANE: Is that the scheme of the Act? MR. WEGENAST: Yes it is. They treat the Dominion company exactly like the local company.

VISCOUNT HALDANE: You have told us what is in this Act? MR. WEGENAST: Yes.

VISCOUNT HALDANE: Then let us get on to the judgment.

SIR JOHN SIMON: Would you read section 29? MR. WEGENAST: I would like to refer to a few more sections in this Act, if I may.

VISCOUNT HALDANE: I thought you had done with it. MR. WEGENAST: I will take section 129 as a specimen: "Every company incorporated under this Act, and every company incorporated under any other Act of the province with limited liability, shall use the word 'Limited' as the last word of its name." I refer to that as an attempt to regulate the name of the company. It does not affect our case, and I hope your Lordships do not think I am introducing unnecessary material. What I am trying to show is that this is an Act dealing with status. It is an Act enacting company law. There are companies incorporated by the Dominion which have not the word "Limited" after the name. Here is a section which would at once affect them. Now I will refer to section 29.

VISCOUNT HALDANE: I have already read and marked that. MR. WEGENAST: About the middle is the point. Sub-section 3 gives the Registrar the power to strike the company off the Registrar, and the company thereupon shall be dissolved. That includes the local company and the Dominion company alike. Then, among the sections which your Lordships might like to look at as showing just the sort of embarrassment that would follow on registering this, are section 32, which requires us to number our shares—the Dominion Act does not—and section 39, which requires us to keep a register of the shareholders in a certain way inconsistent with that required by the Dominion Act. Section 41 deals with the closing of the Register in a way inconsistent with the provisions of the Dominion Companies Act. Sections 59 to 73 deal with the subject of meetings of shareholders.

MR. HENN COLLINS: My Lords, I think I ought to interpose to say that this legislation has since been amended, so that any argument which my friend founds on the provisions of Part II. cannot be put on the basis of a constitutional question

at all, because under the present legislation Part II. is the sole part which refers to Dominion companies. The rest of the Act does not.

VISCOUNT HALDANE: Do you mean that there is a difference in the Act now? MR. HENN COLLINS: It is substantially the same Act, but the difference has been made in the simplest possible way. Section 3 of the present Act provides that: "'Company' means in Parts I., III., and IV. a company incorporated by or under the authority of the Legislature of Saskatchewan; in Part II. it means any company incorporated or registered under this Act, but it does not in any part include a mutual insurance company."

VISCOUNT HALDANE: Does it make any substantial difference? MR. HENN COLLINS: It sweeps such force as there was from my learned friend's argument altogether.

VISCOUNT HALDANE: All those provisions which Mr. Wegenast has been dealing with remain in some form, do they not? MR. HENN COLLINS: Only as to Saskatchewan companies; they do not touch Dominion companies.

VISCOUNT HALDANE: What Act is that? MR. WEGENAST: That is an Act passed since that action was brought?

MR. HENN COLLINS: Yes.

VISCOUNT HALDANE: We are not concerned with that. MR. HENN COLLINS: I am only saying, if it is put forward as a constitutional question it is not very practical.

VISCOUNT HALDANE: We are not deciding any constitutional question which we are not forced to decide in these proceedings. MR. HENN COLLINS: It is not a practical question at this time.

VISCOUNT CAVE: Part II. still applies, does it not? MR. WEGENAST: That includes the provision I have just referred to.

VISCOUNT HALDANE: Take this as the law as it then was. MR. WEGENAST: I think it is fair to assume that the new legislation has been affected by arguments in the lower Courts.

VISCOUNT HALDANE: Anyhow you have nothing to do with it? MR. WEGENAST: Then section 80 is an important provision dealing with prospectuses. We have two provisions purporting to govern any prospectus which the company may issue. I do not want to go into this, but your Lordships will appreciate the embarrassment that might have ensued from the mere mention of these provisions.

VISCOUNT HALDANE: I think we know enough about them to be able to understand what is said about them. MR. WEGENAST: Then section 86 is as to the qualification of directors.

VISCOUNT HALDANE: They are all the same kind of thing. MR. WEGENAST: They are all examples. May I give your Lordship the numbers without saying what they are? Section 90, sections 93 to 100, section 107, as to the form of contract; section 115, which is rather important, governing, as it does, the commencement of the business. Here are provisions of the Act deferring the commencement of the business until certain requirements have been complied with. There is nothing of the kind in the Dominion Act. Then I have referred your Lordships to section 129, as to the word "limited."

VISCOUNT HALDANE: Yes. MR. WEGENAST: Do I take it that your Lordships wish me to read the judgments of the lower Courts?

VISCOUNT HALDANE: I think so. Did the Supreme Court take the same view as the Court of Appeal? MR. WEGENAST: Yes, I may say that in the Manitoba case the judgment was given *pro forma* by consent of counsel by the trial Judge without any argument, and the argument took place before the Court of Appeal, which divided equally, two Judges being in our favour and two against us.

VISCOUNT HALDANE: What proceedings were taken? Were proceedings taken in each province? MR. WEGENAST: Yes.

VISCOUNT HALDANE: Then there are judgments in each province? MR. WEGENAST: Yes.

VISCOUNT HALDANE: Are they all pretty full judgments? MR. WEGENAST: Yes. The judgment of the Supreme Court of Saskatchewan was delivered by one Judge.

VISCOUNT HALDANE: In the other is there a full judgment? MR. WEGENAST: Yes, in Manitoba there are full judgments.

VISCOUNT HALDANE: I suppose we shall have to read them at some time, and we had better read them all through, taking them in chronological order. Which was given first? MR. WEGENAST: The Great Western Saddlery Company's case. Your Lordships will find that under K., at page 36. This is the judgment of Mr. Justice Elwood in the lower Court.

LORD PARMOOR: Is this a judgment on a special case? MR. WEGENAST: Yes; a special case stated; the exhibits are part of the special case.

LORD PARMOOR: He gives answers to certain question. MR. WEGENAST: Yes. That is only one of the Saskatchewan cases.

VISCOUNT CAVE: Which of the three? MR. WEGENAST: It is *Harmer* v. *A. Macdonald Company.*

VISCOUNT HALDANE: What was the nature of that litigation? MR. WEGENAST: It was an action by a shareholder of the company against the company for an injunction to restrain that company from carrying on business without being registered or licensed or in the alternative for a mandamus.

VISCOUNT HALDANE: This ingenious person does not even give the title of the action; what was the title of the action? MR. WEGENAST: Under the Supreme Court Rules the titles are not repeated.

VISCOUNT HALDANE: But surely when we have to wade through this thing they might have told us the name of the case. MR. WEGENAST: On page 18 is the general heading for all the materials which follow. That is the case of *Harmer* v. *Macdonald.* "The questions involved in this case are the result of the following stated cases, namely: This action was commenced on the 6th day of May, 1916, by writ of summons wherein the plaintiff claimed, as a shareholder of the defendant company, an injunction against the defendant company restraining the defendant company and its directors, agents and representatives from continuing to carry on business in the Province of Saskatchewan without being registered or licensed as required by the Companies Act of Saskatchewan (Revised Statutes of Saskatchewan, 1915, chapter 14). The plaintiff claimed in the alternative a mandamus commanding the said defendant company and the directors thereof to cause the said defendant company to be registered under section 23 of the said Companies Act of the Province of Saskatchewan, and to maintain such registration, and to maintain licenses as required by section 25 of the said Act, so long as the defendant company shall carry on business in the said Province of Saskatchewan. Attached thereto is a copy of the statement of claim herein marked Exhibit "A." The parties have concurred in submitting the following statement of facts, and the questions of law arising thereon, for the opinion of the Court: 1. The defendant company is a company incorporated by letters patent (a copy of which is thereto annexed and marked Exhibit 'B'), dated the 7th December, 1912, issued by the Secretary of State for Canada, under the authority of the Companies Act of Canada (Revised Statutes of Canada, 1906, chapter 79), with head office at the City of Winnipeg, in the Province of Manitoba, and empowered *into alia* to carry on throughout Canada the business of wholesale and retail merchants. 2. In pursuance of the powers under the said letters patent, the defendant company has been, and is at the date of this action, maintaining at Moose Jaw, and other places in Saskatchewan, branch offices, for conducting its business in general merchandise throughout the Province of Saskatchewan and part of the Province of Alberta." I may say that it will appear later this company is engaged in what is called a mail order business, that is distributing goods ordered by mail. "On or about the 15th of January, 1913, the defendant company made application to the Registrar of Companies of the Province of Saskatchewan for registration under the Foreign Companies Act of Saskatchewan (Revised Statutes of Saskatchewan, 1909, chapter 73), and received from the said Registrar a document purporting to be a certificate of registration (a copy of which is thereto annexed, and marked Exhibit 'E'), dated the 20th of January 1913." Does your Lordship wish to look at the exhibits before I pass on?

VISCOUNT CAVE: It is just an ordinary certificate of registration. MR. WEGENAST: Yes. There may be something turning on that later. "On or about

the 8th December, 1914, the defendant company received from the said Registrar of Companies a notice, dated 1st December, 1914, accompanied by a schedule of fees (a copy of which is thereto annexed, and marked Exhibit 'D'), and calling for a remittance of eighty-five ($85.00) dollars, on account of annual license fee, to which the defendant company replied by letter (a copy of which is thereto annexed, and marked Exhibit 'E'), dated the 8th December, 1914, and received in turn a reply from the said Registrar of Companies a letter (a copy of which is thereto annexed, and marked Exhibit 'F'), dated the 12th of December, 1914." The importance of this reference is this, that the company was asked to pay certain fees under the older Statute, which was admittedly *ultra vires* before, but could receive a license under this Act.

VISCOUNT HALDANE: We have not heard of the older Act. Do not go into it please, tell us what it is. MR. WEGENAST: It was a Foreign Companies Act of Saskatchewan, and it required all companies—well it was in terms very similar to the Manitoba and Ontario Acts, only that the companies were frankly called foreign companies, the Dominion being included in the category; there was the usual penalty, incapacity to sue. That was repealed as the result of the John Deere Plow case, as the Attorney-General explained, and in the case of the Macdonald Company, the Registrar of Companies asked that the arrears under the old Act should be paid as a condition to receiving the license under the new. "On or about the 3rd March, 1916, the defendant company received from H. E. Sampson, one of His Majesty's counsel, acting as Crown Prosecutor for the Government of Saskatchewan."

VISCOUNT CAVE: It would be useful to refer to Exhibits "E" and "F" at page 29.

LORD PARMOOR: The Certificate of Registration appears to be an earlier exhibit, Exhibit "C," on page 26. MR. WEGENAST: Yes.

LORD PARMOOR: It appears to be an ordinary Certificate of Registration; there is nothing special in it. MR. WEGENAST: Yes, the companies were required under the old Act to register just as if they were local companies.

LORD PARMOOR: This was an application that the company should register; it would appear to have registered, as a certificate of registration appears to have been issued, and it was afterwards discharged. MR. MOSS: The company was struck off.

MR. WEGENAST: The Companies Act was held and deemed to be *ultra vires*.

LORD PARMOOR: I daresay; I was looking at the exhibit.

VISCOUNT CAVE: The certificate granted in 1913 is on page 26, Exhibit "C." On page 27 there is a letter in 1914 asking for fees. MR. WEGENAST: Yes.

VISCOUNT CAVE: Then on page 29 you get the reply refusing to pay the fees on the ground that the company holds the Dominion charter.

VISCOUNT HALDANE: What is "The decision of the Privy Council"? MR. WEGENAST: The John Deere Plow case.

VISCOUNT HALDANE: No, this is in 1914; John Deere Plow was not decided in 1914. MR. WEGENAST: Yes, my Lord, in the fall of 1914.

VISCOUNT HALDANE: Then it may just have been.

LORD SUMNER: The judgment was in November, 1914. MR. WEGENAST: Then the Registrar advises that if the "Company does not pay this fee it will be struck off." Then later, in 1916, there is a letter.

LORD PARMOOR: While it was struck off did it go on carrying on its business, whatever it was? MR. WEGENAST: Yes.

VISCOUNT HALDANE: The Act of 1915 is the one we have been looking at, is it? MR. WEGENAST: Yes. Your Lordships will observe, if I am not repeating myself, that the company was asked as a condition of the license under the valid Act, as it was supposed to be of 1915, to pay a fee under the admittedly invalid Act, the earlier Act. Then if I may go on with the judgment: "On or about the 3rd March, 1916, the defendant company received from H. E. Sampson, one of His Majesty's counsel, acting as Crown Prosecutor for the Government of Saskatchewan, a letter (a copy of which is thereto annexed and marked Exhibit 'G'), dated the 28th February, 1916"—that is on page 30—"whereupon there ensued between the defendant company and the said H. E. Sampson and the said Registrar of

Companies, the correspondence embodied in the copies of letters thereto annexed and marked Exhibits' H, I, K, L, M, N, O, P and Q'." Those are a series of letters which resulted in showing that the Registrar had already struck the company off, and it was put that it could not be restored to the register without paying these arrears as they were called, and the company finally refused to make any payment.

VISCOUNT HALDANE: That is the substance of it. MR. WEGENAST: Yes. May I say just here that the two prosecutions in Saskatchewan are to some extent an exception to the friendly nature of these actions; they were begun at arms length, and we have a substantial bill of costs taxed against us in those cases. If we labour this a little it will be in the interest of protecting my costs. The Saskatchewan Government, as I understand it, has not acceded to the arrangement which has been made as between the litigants and the Provinces of Manitoba and Ontario, that there should be no costs. We say, of course, in this circumstance alone we will be entitled to succeed in our action.

Now, my Lords, going on with the judgment: "The defendant company was struck off the register of joint stock companies on the 15th day of September, 1915, and no application has been made to restore the said company on the said register. The defendant company claims by way of defence that the said defendant company has in virtue of its letters patent and of section 29 of the Companies Act of Canada (Revised Statutes of Canada, 1908, chapter 1), full authority and right to exercise in the said Province of Saskatchewan the status and functions of a corporation for the purpose of carrying out in the said province the objects and undertaking set forth in the said letters patent; and that the provisions of the said Companies Act of Saskatchewan in so far as they purport to apply to the said company are *ultra vires* of the Legislature of the Province of Saskatchewan. The questions for the opinion of the Court are: First: Whether the provisions of the said Companies Act of Saskatchewan in so far as they purport to apply to the defendant company are *intra vires* of the Legislature of the Province of Saskatchewan. Second: Whether the defendant company is precluded by reason of not being registered or licensed under the said Companies Act of Saskatchewan from carrying out its objects and undertaking in the Province of Saskatchewan. Third: Whether the defendant company is subject to penalties prescribed by the said Companies Act of Saskatchewan for carrying on business without being registered or licensed. If the Court shall answer any of the above questions, so as to sustain the validity of the plaintiff's claim, then judgment shall be entered for the plaintiff for an injunction, or, in the alternative, for a mandamus, as claimed by the plaintiffs, upon such terms as the Court may deem just."

VISCOUNT HALDANE: Now you may pass to page 40; this is just setting out what we have read. MR. WEGENAST: Yes. "In considering the questions raised, it seems to me in the first place important to determine whether or not the effect of the legislation above referred to is to impose direct taxation or whether it interferes with the status of Dominion companies or prevents them from exercising the powers conferred upon them by the Parliament of Canada. Dealing with the question as to whether or not the legislation is direct taxation I am unable to distinguish this case from the cases of the *Bank of Toronto* v. *Lambe,* 56 L. J. P. C. 87, and the *Brewers and Maltsters Association* v. *Attorney-General of Ontario,* 66 L. J. P. C. 34, and it seems to me from what is held in those cases that I must hold in this case that the fees imposed are direct taxation within the powers conferred upon the province by the provisions of the British North America Act. The next question to determine is whether or not, in view of the penalties imposed by the Act, there is an interference with the status of the defendant company preventing it from exercising the powers conferred by the Dominion incorporation. The following cases were cited by counsel for defendants." Then follow a list of the cases before this Board including La Companie Hydraulic case and the *Citizens Insurance Company* v. *Parsons.* Then the judgment goes on: "In all of the above cases it will be found that there was apparent in the legislation an interference with the corporate powers of the company, attacking the legislation, or a prohibition from carrying on business. For instance, in *Brown* v. *Moore,* there was a statutory prohibition of the sale of intoxicating liquors, and it was held that a contract entered into in face of the statutory prohibition was void, and that the imposition of a penalty for the

contravention of the Statute avoided a contract against the Statute. In *John Deere* v. *Wharton,* there was a prohibition against carrying on business until the extra-provincial company was licensed or registered. In the case at bar there is no such prohibition. It seems to me that this case comes within what was held in *Learoyd* v. *Bracken,* 1894, 1 Queen's Bench Division, page 114, and *Smith* v. *Mawhood,* 14 Meeson & Welsby, page 450. The latter case seems to me to be particularly applicable to the present. In that case, sections 25 and 26 of the Excise License Act, 6 George IV., chapter 81, subject to penalties any manufacturer of or dealer in or seller of tobacco, who should not have his name painted on his premises in manner therein mentioned. At page 464 of the above report Baron Alderson, is reported as follows: "The question is, does the Legislature mean to prohibit the act done or not? If it does, whether it be for the purpose of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it. But here the Legislature has merely said, that where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty, if the house in which he carries on the business shall not have his name, etc., painted on it in letters publicly visible and legible, and at least an inch long, and so forth. He is liable to the penalty, therefore, by carrying on the trade in a house in which these requisites are not complied with, and there is no addition to his criminality if he makes fifty contracts for the sale of tobacco in such a house. It seems to me, therefore, that there is nothing in the Act of Parliament to prohibit every act of sale, but that its only effect is to impose a penalty, for the purpose of the revenue, on the carrying on of the trade without complying with its requisites.' It is quite true that the Saskatchewan Act does provide a penalty for each day on which the business is carried on in contravention of the Act. If the legislation had provided a penalty for each contract made while the company was unlicensed or unregistered, then following what Baron Alderson said above, it might possibly be held that the intention to prohibit the Act was evidenced, but that is not the case here. Any number of contracts may be made each day the company fails to register or to take out a license. I am, therefore, of the opinion that the imposition of the penalty does not interfere with the status of the defendant company or prevent it from exercising the powers conferred on it by its Dominion incorporation. It was urged that the effect of the legislation complained of was to make the defendant company subject to the provision of the Companies Act. Section 25, sub-section 3, it will be noticed, provides that 'A company receiving a license from the Registrar may, subject to the provisions of its charter, Act or other instrument creating it, carry on business to the same extent as if it had been incorporated under this Act.' It seems to me, therefore, that the defendant company, though registered or having got a license, has preserved to it all its corporate capacities and powers conferred by its Act of Incorporation."

VISCOUNT CAVE: Is that some mistake, "Though registered?"

VISCOUNT HALDANE: It must be, "Though not registered." MR. WEGENAST: No, I think it means, "Though registered"—although it comes within the Act, and having got a license it has that preserved to it because it has all the powers that a local company would have.

VISCOUNT HALDANE: You mean he is indicating that the registration does not take anything away? MR. WEGENAST: That is what he means.

LORD PARMOOR: It is still a Dominion company. MR. WEGENAST: Yes, but also a Saskatchewan company.

VISCOUNT CAVE: Even the register would be preserved; in fact the company is not registered, it is struck off the register. MR. WEGENAST: Yes, but we object to registering because it would bring us within the Act.

VISCOUNT CAVE: There must be some mistake there; it may be, "A company though registered." MR. WEGENAST: I did not gather your Lordship's point; that is so; I think he meant a company in general.

VISCOUNT HALDANE: The effect of this is that although under the Statute the company is bound to get a license before it can carry on business at all, it has the right to get a license; it is bound to get a license, and he says that is not an interference with its status. MR. WEGENAST: Yes, that is my learned friend's case.

VISCOUNT HALDANE: If it is pure taxation it may be quite right, and he seems to think it is. MR. WEGENAST: Even then, of course, I submit that the province could not license the company *qua* company; it may license it as a shopkeeper or as a maltster, but not as a Dominion company.

LORD PARMOOR: What he says is very clear, that it imposed a direct taxation within the powers conferred upon the province by the British North America Act. MR. WEGENAST: That is a categorical finding that this is a taxation Act.

LORD PARMOOR: Then they refer to authorities.

VISCOUNT HALDANE: Yes; that is the ground of his judgment; that this is taxation. MR. WEGENAST: That is the ground of all the judgments; they start with the assumption that the Acts are taxation Acts; and if they start with that assumption it is a different case.

VISCOUNT HALDANE: We had better go to another judgment and see how it is put there. What will you take us to now? MR. WEGENAST: The judgment supporting that in the Supreme Court of Saskatchewan *en banc*; that is on page 43, just following. "The defendant company was incorporated by letters patent issued by the Secretary of State for Canada under the Companies Act, Revised Statutes of Canada, 1906, chapter 79." Perhaps that may be omitted. Then at the top of page 44 he leaves the facts immediately and goes on referring to the authorities. "Following the decision of the Privy Council in *John Deere Plow Company, Limited* v. *Wharton,* 1915, Appeal Cases, page 330, the Foreign Companies Act above mentioned was repealed, and the Companies Act of 1915 was passed. This Act applies to all companies both provincial and foreign. By section 25 every company upon complying with the provisions of that Act may receive a license to carry on its business and exercise its powers in Saskatchewan. This license is to expire on the 31st December in each year, and is renewable on payment of a prescribed fee. Sub-section (5) of section 25 provides that every company that carries on business in Saskatchewan without a license, and certain officers of the company, shall be guilty of an offence and be liable on summary conviction to a penalty, not exceeding $25.00, for every day the default continues. On behalf of the defendant company it is contended that these provisions are *ultra vires* of the Legislature of Saskatchewan, in that they prevent the company from doing business in Saskatchewan, that being one of the powers conferred on the company by its charter. The *John Deere Plow Company, Limited* v. *Wharton,* is cited as the authority for this proposition." I may say that was not the argument in the case, the argument was the same argument that we are advancing here, that there was an interference with status; we did not advance the prohibition. "Prior to the 1915 legislation there was a special Act applying to all companies not incorporated under an Act of the Legislature of Saskatchewan, called the Foreign Companies Act. This Act provided, amongst other things, that any company required to be registered should, not while unregistered, be capable of maintaining any action in any Court in respect of any contract made in whole or part in Saskatchewan. This provision having by the above mentioned case been held to be *ultra vires,* is dropped from the 1915 Act, and in further compliance with what is suggested by that decision, the law of the province as relating to incorporated companies is made generally applicable to all companies. We, therefore, start out with the proposition that the Legislature in passing the Companies Act in 1915 intended to keep within its powers as interpreted by the Privy Council in the *John Deere Plow Company, Limited* v. *Wharton.* The principle decided in that case is contained in the following quotation, page 341: 'It is enough for the present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by Provincial Legislation.' Therefore, I take it that the Legislature intended to refrain from anything that would 'destroy the status and powers of a Dominion company,' and to make their legislation applicable to companies, of general application to all companies wherever incorporated. I am aware, however, that the intention of the Legislature can only be obtained from the language they have used, and therefore, if the intention which I have suggested is quite

obvious in the passing of the 915 legislation, is not borne out by the language used, then we cannot give that meaning to the Act. Counsel for the defendant argued that the provision that every company which carries on business in Saskatchewan without a license would be guilty of an offence and liable on summary conviction to a penalty of $25.00 for every day the default continues, was a prohibition against carrying on its business in the province while unregistered or unlicensed. That because the Legislature imposes a penalty for doing business, such acts would be unlawful, and all contracts entered into by the company would be void, the legislation, therefore, acting as a direct prohibition to doing business. In support of this proposition, he cited a number of cases, amongst them the following." Then he cites the cases cited in the lower Court: " In all these cases a penalty was imposed for doing a certain act unless the requirements of the Statute in that behalf were complied with. I refer to one case, that of *Haug Bros.* v. *Murdock,* decided in our own Courts. There a Statute provided that all engines sold in the province should comply with certain regulations of the Department of Public Works. A penalty was imposed for a breach of this provision. The plaintiff sold an engine to defendant which did not comply with the regulations, and the Court held that the Legislature had impliedly forbidden the sale of an engine in the province unless the regulations were complied with, and that, therefore, the contract was illegal, and plaintiff could not recover. The prohibition of a particular act under a penalty is altogether different from requiring a general regulation to be complied with under a penalty. In the one instance the specific act is forbidden, in the other case no specific act is forbidden, but the party is required to comply with some regulation, if he intends to do business, in this case, as in the case of *Smith* v. *Mawhood,* 14 Meeson & Welsby, page 450, for the purpose of the revenue. The expression 'carries on business' in this Act should be construed as that expression was by Mr. Justice Duff in '*In re Companies,*' 48 S. C. R. 331, at page 416.' 'That is to say, so that the company, as a company, is present at some place within the province.' What I mean by this is, that it was not the intention of the Legislature to prohibit any company from 'doing business.' This expression is used to designate what companies are to become registered and are to pay an annual license fee, that is, companies that are actually in the province. A Dominion or foreign company, not having a physical existence like a natural person, can only show that it is in the province by 'doing business' there. This legislation does not, therefore, deprive the company of its status or its powers. It comes under the principle laid down in *John Deere Plow Company, Limited* v. *Wharton,* by Haldane, Lord Chancellor, page 342. 'It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by section 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the Statutes of the province as to Mortmain (*Colonial Building and Investment Association* v. *Attorney-General of Quebec,* 9 Appeal Cases, page 157); or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe,* 12 Appeal Cases, page 575).' And further on he says: 'It might have been competent to that Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information.' The legislation in this case does not go so far as it was suggested by the Lord Chancellor they might go. The law in question is a general law, and requires all companies to register, not simply foreign companies, and as they are subject to laws of general application, which in this instance means of general application to corporations, because the Mortmain Acts which were in *Colonial Building & Investment Association* v. *Attorney-General of Quebec* held to be a general law which foreign companies must observe, applies only to corporations." I did not point out that provision of the Saskatchewan Act relating to the holding of land is the very brief phrase of the English Act: "With power to hold lands," which corresponds in section 4 or section 5 of the Imperial Act. "The provisions of the Act requiring all companies to register and to take out an annual license being

general law of the province, applicable to all companies, and not in any way affecting the status or powers of the company, because as I have said it does not prevent the company from exercising its functions and doing business within the province, was therefore *intra vires* of the Legislature, and must be obeyed by the defendant company. It is unnecessary for me to discuss the question as to whether the fees payable are direct taxation as this is clearly decided in *Bank of Toronto* v. *Lambe*. The appeal should, therefore, be dismissed with costs."

LORD PARMOOR: That is to say though it is a Dominion company the power of the Provincial Government under section 92 shall be exercised? MR. WEGENAST: Absolutely.

LORD PARMOOR: He goes on to say in this case he thinks that is all that has been done. MR. WEGENAST: That is where we take issue.

SIR JOHN SIMON: The last sentence means, if it is taxation, there is no doubt it is direct taxation.

VISCOUNT HALDANE: In the Supreme Court of Canada, did they give a judgment in this case? MR. WEGENAST: The judgments overlap. Mr. Justice Idington dealt with the Saskatchewan and Manitoba cases in one judgment; the other Judges did not.

VISCOUNT HALDANE: Might not it be convenient now to take us straight to the Supreme Court of Canada judgment; then you can go back to the judgments of the Court below afterwards as far as necessary. MR. WEGENAST: Yes; perhaps it would be well to take Mr. Justice Idington's judgment; he deals with the two.

VISCOUNT HALDANE: We will take them in their sequence. MR. WEGENAST: They are set out in a document tabulated N., at page 1. I think it should have been observed that Mr. Justice Newlands in the Supreme Court of Saskatchewan *en banc,* was dealing with the three cases. The police Court cases had also been brought up to the Supreme Court of Saskatchewan *en banc,* whereas Mr. Justice Elwood dealt only with the Harmer case.

VISCOUNT HALDANE: It is just the same point. MR. WEGENAST: It is the same issue. The formal judgment shows that, and I think there are as a matter of fact, written judgments of just a line or two each referring to the two Police Court cases: "These three actions were brought to test the constitutional validity of certain sections of the Companies Act of Saskatchewan, Revised Statutes of Saskatchewan, 1915, c. 14, requiring all companies, provincial and foreign, to register in the province, and to take out an annual license and pay an annual fee before carrying on business therein, and providing that every company carrying on business in Saskatchewan without such license should be guilty of an offence and be liable on summary conviction to a penalty not exceeding $50.00 for every day the default continued, came before us in one consolidated appeal, and were argued together. The trial Judge in the Court of first instance upheld the validity of the impeached sections, and the Court of Appeal in that province, consisting of five Judges, unanimously confirmed the judgment of the trial Judge. The sections in question, the validity of which is impeached, were enacted by the Legislature of that province after the decision of the Judicial Committee in the case of *John Deere Plow Co.* v. *Wharton,* 1915, Appeal Cases 330, and were no doubt enacted in an honest attempt to comply with the principles, which in that case, it was declared should control provincial legislation with respect to companies chartered by the Dominion of Canada. The objectionable features of the previously existing legislation of the Saskatchewan Legislature somewhat similar to those sections of the British Columbia Legislature, which in the Wharton case, had been held *ultra vires,* were eliminated, and the present provisions introduced in lieu of them. Whether the Legislature has been successful or not in avoiding the constitutional perils of enactments, which may be said to some extent to control and regulate the business activities in the province of Dominion companies, is the question now before us. It depends altogether upon the construction given to the reasons for judgment of the Judicial Committee in the Wharton case, before referred to. I have read and re-read this judgment several times, and studied it most carefully. As a result I cannot conclude that the Legislature in this instance has exceeded its powers in enacting legislation requiring all companies, local and foreign, including Dominion,

to register and pay an annual fee. Nor do I think the section imposing a penalty upon a Dominion company for every day it carries on business in the province without having paid the annual fee, is *ultra vires* or other than a reasonable sanction to the requirement of the payment of the annual tax or fee imposed. I reach this conclusion, not without grave doubt, whether the section requiring the company to take out a license to carry on business in the province is not objectionable and *ultra vires.* In the result, however, I have concluded that the Saskatchewan Companies Act, as amended and now before us, while in form to some extent objectionable, as seeming to require a provincial license to enable a Dominion company to carry on its business in the province may, nevertheless, be so construed as to be held to be merely a taxing act, levying an annual tax or fee, alike on local companies as on extra-provincial companies, including Dominion ones. Its form may be, and I think is, objectionable and unfortunate, but its essence and substance merely require the payment of an annual fee or tax with a provision that the company shall not carry on its business in the province until the annual fee is paid, subject to a penalty for every day it so transgresses. The requirement of payment of such a tax is not objectionable, and is expressly referred to in the Wharton case by the Judicial Committee as permissible legislation by the province, while the penalty for non-payment of the fee may be looked upon as a non-objectionable sanction for the recovery of the tax. I do not think the requirement of a license to enable the company to carry on its business is *intra vires,* but I would in this case treat it as negligible and inapplicable to Dominion companies, and if the tax was paid more in the nature of a receipt for its payment than as a license to carry on business, I do not think the company after payment of the tax would be liable to the penalty prescribed, if it declined to accept the license and continued to carry on its business."

VISCOUNT HALDANE: This is very difficult to follow. He says the requirement of the license is *ultra vires.* MR. WEGENAST: Yes.

VISCOUNT HALDANE: But it is to be treated as negligible or inapplicable. I suppose what he means is that the tax may be imposed. MR. WEGENAST: He seems to regard this initial fee which was required as in reality a tax; but the annual license fee he seems to regard as a license fee, and says it is *ultra vires.*

VISCOUNT HALDANE: Let us follow this. He says first of all that the payments made for taking out a license are not *ultra vires*; it is very difficult to follow that, as the provisions requiring the company to take out a license is not *ultra vires.* MR. WEGENAST: "I do not think the requirement of a license to enable the company to carry on its business is *intra vires.*"

VISCOUNT HALDANE: He says it is a mere taxing act in terms and objectionable, but its sense merely requires the payment of an annual fee. He thinks you were claiming an annual fee. MR. WEGENAST: Pay an annual fee, and they refuse the license.

VISCOUNT HALDANE: There is only one fee payable here. MR. WEGENAST: No, two, the registration fee, which is really an incorporation fee, exactly the same fee as a local corporation pays.

VISCOUNT HALDANE: That is paid once for all. MR. WEGENAST: That is paid once for all.

VISCOUNT HALDANE: Then the annual license fee. MR. WEGENAST: Then the annual license fee.

VISCOUNT HALDANE: He says both of those fees may be asked for apparently. MR. WEGENAST: It is as your Lordship says, difficult to follow.

VISCOUNT HALDANE: "Such a tax," that seems to apply to all the taxes asked. The requirement of a license, although *ultra vires* is negligible, and if the company paid the tax and then refused to take out a license it could be made liable for the penalty. MR. WEGENAST: The difficulty is the company could not get to the stage of paying the license till they registered and brought themselves under this Act.

VISCOUNT HALDANE: Is this case substantially a decision that you are liable simply to the tax? It looks a little like that. MR. WEGENAST: It does. Of course, the argument had turned very largely on the question I have raised before your Lordships.

VISCOUNT HALDANE: The shareholder said to you. Go and register and take out a license. MR. WEGENAST: Yes.

VISCOUNT HALDANE: According to the Chief Justice that cannot be right, because the shareholder asked you to do everything, did not he? MR. WEGENAST: Yes, and I was mandamused to do everything.

VISCOUNT HALDANE: When you got into the Police Court that was merely a claim to the tax, was not it? MR. WEGENAST: No, it was a prosecution for the penalty, and we were fined five dollars without costs.

VISCOUNT HALDANE: For trading without a license? MR. WEGENAST: Yes, it is an offence.

VISCOUNT HALDANE: So that you say really that was the same thing as the shareholder's case? MR. WEGENAST: Yes, we were prohibited; there is an actual decision against us; they were all committing an offence not for not paying the tax, but for carrying on business.

VISCOUNT HALDANE: When we have finished reading the judgments we may have to look closely at what was the exact claim in the proceedings. MR. WEGENAST: Yes. Then the judgment goes on: "The Legislature has no power to require the acceptance of a license from it to enable a Dominion company to carry on its business in the province. It might require registration, it might impose an annual tax, it might possibly enact the penalty clause as a sanction for the recovery of the tax, but it could not compel the company to accept a license from it to enable it to carry on its business. The company derived its power to do that throughout the Dominion from the Dominion who gave it its charter, and while the Legislature could not prohibit or control the exercise of these powers, it nevertheless could, in my judgment, exact the payment of annual tax from the Dominion company in common with other foreign companies and local companies, which itself created and chartered, and could probably enforce the payment of such tax by the imposition of a penalty. I reach this latter conclusion, as I have said, with difficulty and doubt. It is to be regretted that the legislation should take the form it did, but looking at its essence and construing it as I do, I will not hold it to be *ultra vires*. Of course, the legislation requiring a license and prescribing a penalty or penalties for not taking one out before carrying on business, may take an objectionable form. In the case before us, I think on my construction of the Statute it, while objectionable in form, is not so in essence. The license required, the fee payable and the penalty prescribed apply equally to local and foreign companies, which include Dominion, and it cannot be successfully argued that the fees are excessive or that they are other than such fees as may reasonably be imposed as direct taxation for the purpose of revenue within the province. *Bank of Toronto* v. *Lambe,* 12 Appeal Cases 575. Nor can it be said that such fees and the penalties imposed on the company for carrying on its business without their payment are really calculated to affect the status or powers of a Dominion company. The penalties prescribed are only a means of recovering the annual fees. Once those fees are paid these penalties could not be exacted. I may add that I have not reached my conclusion as to the license without doubt and hesitation in view of the reasons for the decision in the Wharton case, and as these appeals avowedly seek to obtain a judicial construction of the judgment of the Privy Council in that case, it would have been better from every standpoint, in my opinion, if they had been taken direct to the fountain head, which could best explain the exact meaning and effect of the principles it laid down, and so avoid the delays and costs of totally unnecessary appeals to this Court."

VISCOUNT HALDANE: That is true, but he has not indicated the fountain head. MR. WALLACE NESBITT: They could have gone direct to the Court of Appeal.

VISCOUNT HALDANE: Yes, I suppose they could. MR. WALLACE NESBITT: That is what they did in Ontario.

VISCOUNT HALDANE: There are so many restrictions on that now; they could in this case. MR. WALLACE NESBITT: At any rate that is what they did in Ontario.

MR. WEGENAST: I am not so sure we were entitled to go in the Police Court case.

VISCOUNT HALDANE: No, I think there might have been difficulties. We have always said in these Constitutional cases we want the assistance of the Supreme Court and the Supreme Court always say they prefer not to give judgments. MR. WEGENAST: Then the judgment of Mr. Justice Anglin is very brief: "The impeached provisions of the Companies Act of Saskatchewan (Revised Statutes of Saskatchewan, 1915, c. 14), are in my opinion clearly distinguishable from those of the British Columbia Statute held to be *ultra vires* in *John Deere Plow Co.* v. *Wharton,* 1915, Appeal Cases 330. The important differences are so fully and so satisfactorily pointed out and discussed in the judgments of Elwood and Newlands, JJ., in the Saskatchewan Courts, and in the opinions prepared by my brothers Brodeur and Mignault, which I have had the advantage of perusing, that I cannot do better than adopt the reasons given by them for concurring in the dismissal of these appeals." Then there is the judgment of Mr. Justice Brodeur: "The three appellant companies are incorporated under the authority of the Companies Act of Canada (Revised Statutes of Canada, c. 79), and are empowered to carry on their business throughout the Dominion of Canada. By the provisions of sections 23 and 25 of the Saskatchewan Companies Act, any carrying on business in the province must register and take out a license. As the appellant companies have not registered and have not taken out the prescribed license, they have been prosecuted. They claim that those provisions of the Provincial Statute are *ultra vires,* and they rely on the decision of the Privy Council in the case of *John Deere Plow* v. *Wharton,* 1915, Appeal Cases, page 330, to sustain their contention. The John Deere Plow case had reference to the operation of the Companies Act of British Columbia, which empowered the provincial authorities to refuse to a federal company the right to carry on business on the ground that there was another company of the same name upon the local register. The evidence showed that the John Deere Plow Company had applied for a license and its application had been rejected. Such legislation and action affected the status of the company itself, though it had been incorporated by the Dominion authorities, and the Privy Council decided (1915, Appeal Cases 330), that the legislation was *ultra vires* a Provincial Legislature, as far as the federal companies were concerned. When the John Deere Plow decision was rendered, the Saskatchewan legislation contained provisions similar to those of British Columbia and the Saskatchewan Legislature at its next session repealed the objectionable provisions and the companies legislation is now contained in the chapter 14 of the Statutes of 1915. The provisions as to registration and licensing, which were applicable formerly to foreign and Dominion companies are now of general application to all companies, whether they are incorporated by the province itself or by the Dominion or other provincial authorities or foreign States. The Statute simply provides that all companies, whether local or not, would be equally taxed by means of license, and the Statute also provides that they should all be registered. The failure of those companies to take a license or to register renders them liable to a penalty. There is nothing in the Statute which prevents them from carrying out their corporate powers to make contracts and to sue under those contracts, but they are simply required to observe the general registration provisions and take a license for purposes of taxation. The object of the registration provision is to keep the public informed as to the status of those companies. They are bound to hand over to the Registrar a return showing the amount of the share capital, the quantity subscribed and paid up, the names of the directors and some other useful information (section 34), which the public may need to do business with those companies. It is of the utmost importance for a person who contracts with a corporation to know the legal status of the latter, and to see whether the contract contemplated is within the powers granted to the company by its act of incorporation or its letters patent. The fees which the companies have to pay for their registration look to me as being very reasonable, and hardly cover the expenses which the establishment of the Registrar's office would entail. The unauthorized and fictitious companies will then be prevented from deceiving the public, since anyone may obtain from the Registrar the information as to any *bona fide* company, and may ascertain the the powers and standing of such company in the same manner as if the company had obtained its charter under provincial authority. Perhaps that knowledge could

be procured in applying to the Dominion authorities; but who is going to inform the person desirous of procuring that information that the company is a federal one? It might be a foreign or provincial company. Besides, the distances in our country are so great that each province should have in its capital the necessary data as to the existence, the statute and the capacity of any company. That provision concerning registration is a law of general application enacted under the powers conferred by section 92, and there is nothing in it which may deprive a federal company of its status and powers. The obligation for a federal company to take out a license from and pay a tax to the provincial authorities is also a law of general application. It, and the companies incorporated locally, have to pay for it just as well as the companies, incorporated outside the province. In the case of *Bank of Toronto* v. *Lambe,* 12 Appeal Cases, page 575, that question has been decided. It was there held that though the banks are incorporated by the Dominion Parliament, they may be bound to contribute to the public objects of the provinces where they carry on business. That same principle was affirmed by the Privy Council in the Brewers and Maltsters case (1897, Appeal Cases, page 231). where the 'Ontario Liquor License Act,' which provided that no person should sell any liquors for consumption in the province without having first obtained a license, was held to be valid. The judgment of the inferior Courts in the present cases, which decided that sections 23 and 25 of the Saskatchewan Companies Act were valid and *intra vires,* are well founded. The appeal should be dismissed."

VISCOUNT HALDANE: That relates only to the Saskatchewan Act. MR. WEGENAST: Yes.

VISCOUNT HALDANE: They do not consider any other Act there; that is in a separate judgment. MR. WEGENAST: Yes.

(Adjourned till Thursday morning next.)

SECOND DAY.

MR. WEGENAST: My Lords, I was reading from the judgments of the lower Courts.

VISCOUNT HALDANE: When you have finished those, then will be the time to come to the John Deere Plow case, and to just consider what we really decided in that case, but we want to get the points of those judgments in our minds first. MR. WEGENAST: I am glad to hear your Lordships say that. I was just going to say I am withholding comments on the judgments as I go along because I want to read the John Deere Plow judgment presently.

VISCOUNT HALDANE: I think you must, because you are really appealing on what we decided there. MR. WEGENAST: If your Lordship pleases. I was reading on page 5 in the portion of the record tabulated as N, in the judgment of Mr. Justice Mignault.

LORD PARMOOR: The judgment seems to say this: That, of course, the Provincial Government has power under section 92 over direct taxation. MR. WEGENAST: Yes. They are on the Lambe case and the Brewers and Maltsters' case.

VISCOUNT HALDANE: It seems to come to the point. MR. WEGENAST: Yes. I conceive it my duty to go with some care into the John Deere Plow case, and the Brewers case, and then the Lambe case, and that will exhaust the subject.

VISCOUNT HALDANE: That is the substance of the Chief Justice's decision: that it was really, within section 92, direct taxation. MR. WEGENAST: They proceed upon the assumption that it is direct taxation.

LORD PARMOOR: They go a little further, because they think they are governed by the Lambe case? MR. WEGENAST: Yes. Starting with the assumption that this is *prima facie* a taxation Act they say it is valid under the Lambe case. We start by saying it is not a taxation Act, and if it is there are features which make it bad.

VISCOUNT HALDANE: What did Mr. Justice Brodeur say? Did he say it was direct taxation? MR. WEGENAST: Yes.

LORD PARMOOR: He says at page 5: "In the case of the *Bank of Toronto* v. *Lambe,* that question has been decided." That is to say it is direct taxation? MR.

WEGENAST: Yes. Then he goes on to say in the next paragraph: "That same principle was affirmed by the Privy Council in the Brewers and Distillers case."

VISCOUNT HALDANE: We will look at those cases later. MR. WEGENAST: Now, I will proceed with the judgment of Mr. Justice Mignault.

VISCOUNT HALDANE: Did he agree? MR. WEGENAST: Yes, my Lord. He says: "These three appeals were argued together, and the question is as to the validity of sections 23 and 25 of the Companies Act of Saskatchewan. Chapter 14 of the Statutes of 1915." May I observe there that all the Judges in the Supreme Court apparently lost sight of what was my main argument, that is to say, that the whole of the Saskatchewan Act was brought into play, and it was not a mere question of section 23 and section 25, but the whole Act, and that part of my argument is not dealt with in any of the judgments anywhere.

VISCOUNT CAVE: Section 23 is registration. That you say brings in the whole of the Act? MR. WEGENAST: Yes.

VISCOUNT CAVE: Section 25 is license only, and does not bring in the whole of the Act? MR. WEGENAST: It does in this sense. The company is licensed under section 25. Then under sub-section 3 it has the same powers as a local company subject to the same conditions.

VISCOUNT HALDANE: You say both come in? MR. WEGENAST: Yes. It has the same powers, subject to the same conditions, as a local company.

VISCOUNT HALDANE: That is under section 23? MR. WEGENAST: No. my Lord, under section 25.

VISCOUNT CAVE: Under its powers it may carry on business. Section 25 does not subject it to the other provisions of the Act, but section 23 does, as I understand. MR. WEGENAST: Section 25 at the beginning says: "Upon complying with the provisions of this Act." If it does not comply with the provisions of the Act its license may be cancelled.

VISCOUNT CAVE: That is another matter. However, I do not want to interrupt you. MR. WEGENAST: That brings in the limitations, I think. "That Act was passed after the decision of the Privy Council in the *John Deere Plow Company* v. *Wharton,* and the intention was, no doubt, to conform to the rules therein stated. Whether the Legislature has done so is the question which has now to be decided. In my opinion in the case of the *Great West Saddlery Company, Ltd.* v. *Davidson,* I have stated the test, derived from the Privy Council in the John Deere Plow Company case, according to which the validity of such legislation must be determined. This test is whether a Dominion company is compelled to obtain a license, and to be registered in a province, as a condition of exercising its powers."

VISCOUNT HALDANE: Yes, because you see if it did not take out a license it might be sued for a penalty or for the recovery of the amount of the license fee. He seems to mean it ought to be allowed to carry on under its powers. He is drawing a distinction; a remedy *in personam* is one thing; a remedy affecting its status is another. That is what he means, is it not? MR. WEGENAST: Yes. We go further and say, by attorning to the provincial jurisdiction we involve ourselves in all sorts of complications with the local Companies Act.

VISCOUNT HALDANE: We have had the sections read, have we not? MR. WEGENAST: Yes. They are section 23 and section 25. I am not sure that they were read fully.

VISCOUNT HALDANE: Take your own course. MR. WEGENAST: I may have again to read them later. Mr. Justice Mignault proceeds: "The material sections of the Saskatchewan Statute, which essentially differ from the Manitoba Companies Act referred to in the other case, are sections 23, 24, 25, 26, 27, 28 and 30."

VISCOUNT HALDANE: I think you said the Manitoba Act was just the same as the Ontario Act? MR. WEGENAST: Yes, except that it embodies in one Statute provisions, which in Ontario are contained in two or three Statutes, that is to say the provisions respecting the holding of land are in Ontario contained in a separate Statute.

VISCOUNT HALDANE: What is the broad distinction between the Saskatchewan Act and the Ontario Act? MR. WEGENAST: The broad distinction may be expressed by a very simple phrase; I cannot for the moment think of anything better than this; that the Saskatchewan Legislature in its attempt to attain the generality which was

spoken of in the John Deere Plow case, jumped from the frying pan into the fire. The John Deere Plow case said that legislation affecting Dominion companies should be general legislation, that is affecting all companies and individuals, for instance legislation respecting the registration of deeds, the Statute of Limitations, the Statute of Frauds, and so on. It is perfectly general. Now in its attempt to attain generality, the Saskatchewan Legislature obtained that generality in the very field of all fields which was forbidden to it, that is that of incorporation, the corporation law. They make this Statute general by making it corporation law. In the John Deere Plow case the argument was that because the license was exacted in the way in which it was, therefore the British Columbia Act was corporation law, and therefore *ultra vires*. Here it is plainly corporation law. Here we are saved one step in the argument.

LORD PARMOOR: You say you had not the status of a company? MR. WEGENAST: We say we had no status whatever until we did this. It will not be necessary to read those sections again. I will go on to the next page at line 13: "It is to be noted that these sections apply to all companies, whether incorporated under the Saskatchewan Statute, or otherwise, and that the Registrar does not appear to have the right to refuse registration to companies incorporated under the authority of an Act of the Parliament of Canada. There are no provisions, such as sections 118 and 122 of the Manitoba Companies Act, prohibiting a Dominion company from carrying on business in the province until it has obtained a license, and denying it access to the Courts to enforce contracts made by it while unlicensed." His Lordship is distinguishing his own decision in the Manitoba case. "The real point to my mind is not whether the appellant companies were required to register and to obtain a license, but whether they were compelled to obtain registration and a license as a condition of exercising their powers in the Province of Saskatchewan. They were, no doubt, required to register and to secure a license, and in default of registration they were subject to a penalty not exceeding $50.00 for every day on which they carried on business in contravention to section 23, and in the case of their failure to take a license they were under section 25, subject to a penalty for carrying on business in Saskatchewan without a license not exceeding $25.00 for every day the default continued."

VISCOUNT HALDANE: That is what I was drawing your attention to. He is going on the fact that it is a remedy *in personam*. It does not go to status there. It goes to law, a suit in the Courts. MR. WEGENAST: Is not a remedy *in personam* in the case of a corporation directed to status?

VISCOUNT HALDANE: I suppose that means you simply under your powers under section 92 impose taxation upon a company carrying on business here whether Dominion or Provincial, and the amount to be recovered in the Courts is a penalty. MR. WEGENAST: Yes, but we were prosecuted in the Police Court for the offence, not of not having paid our taxes, but of carrying on business.

VISCOUNT HALDANE: There you get what has been done by the Statute. I think it is there indicated that they might have done it *in personam*. MR. WEGENAST: Yes, we admit that freely.

VISCOUNT HALDANE: You admit they could tax? MR. WEGENAST: Yes, absolutely.

VISCOUNT HALDANE: But you say they have done more. MR. WEGENAST: Yes, and we have done more. We have placed before your Lordships three or four specimens of that sort of Statutes which we admit the province could pass, for instance the Statute in question in the Lambe case is included in the collection before your Lordships. There is a Statute of 1919 of the Province of Saskatchewan, the Corporations Taxation Act, which we freely admit, and we urge, is perfectly valid, but we say this Statute is directed to a different object. The learned Judge goes on at line 21: "The real point to my mind is not whether the appellant companies were required to register and to obtain a license, but whether they were compelled to obtain registration and a license as a condition of exercising their powers in the Province of Saskatchewan." May I just observe there that the local company surely must be registered and licensed before it can carry on business in Saskatchewan, and the same provision is made applicable to the Dominion company. They were, no doubt, required to register, and to secure a license. "The form of

expression in section 25 is not exactly the same as in section 23, but the effect of both sections is that if these companies carry on business in Saskatchewan without having registered or without having obtained a license, they incur a separate penalty for each day they so carry on business. Do these provisions amount to compelling these companies to register and obtain a license as a condition of exercising their powers in Saskatchewan? As I have said, there is nothing here, as in the Manitoba Act, prohibiting an unlicensed Dominion company from carrying on business or depriving it of the power to sue on contracts made by it in pursuance of its business."

VISCOUNT HALDANE: That is the old Manitoba Act. That has been amended now, has it not? MR. WEGENAST: No, it is just as it was: "But inasmuch as carrying on business without registration and without a license is made an offence punishable by a fine, it is argued that this business is thereby made illegal so that no right to sue on a contract made under those circumstances would exist by law." May I point out there that it is one thing to say that the business is illegal; it is another thing to say that the contracts are perforce illegal, and his Lordship has distinguished that. The contract may, or may not be illegal, but we say the business is made illegal, and it is an offence to carry on the business. We assume that the contracts were also illegal, but we may have made a mistake with regard to that. 'It is to be noted that in the John Deere Plow Company case, 1915, Appeal Cases, 330, the British Columbia Companies Act under consideration contained a similar provision (section 167) to sections 23 and 25 of the Saskatchewan Statute, and the Judicial Committee, at page 337, after mentioning, among other provisions of the British Columbia Statute, section 167, said: 'What their Lordships have to decide is whether it was competent to the province to legislate so as to interfere with the carrying on of the business in the province of a Dominion company under the circumstances stated.' And after discussing sections 91 and 92 of the British North America Act, they said: 'It follows from these premises that these provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes.'" Does not that dispose entirely of the argument that the John Deere Plow case rested on the circumstances that the company had been refused a license; it is expressly put on much broader grounds.

MR. WALLACE NESBITT: Under the circumstances stated.

VISCOUNT CAVE: Under the British Columbia Act there is an express clause which says the company shall not carry on business without a license. The provision there was that a company carrying on business without a license should incur a penalty, was it not? MR. WEGENAST: No, it is express. Section 139 says it shall not. It goes on at the end of the third line of section 139: "And no company, firm, broker or other person shall as the representative or agent acting in any other capacity for any such extra-provincial company carry on any of the business of an extra-provincial company within the province until such extra-provincial company shall have been licensed or registered as aforesaid." That of course was copied virtually from the Ontario Act, and the Manitoba Act is in terms the same. Mr. Justice Mignault goes on: "Their Lordships did not attempt to define *a priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by Provincial Legislation although they stated that a Dominion company could not refuse to obey the Statutes of a province as to Mortmain, or escape the payment of taxes, although these may assume the forms of requiring, as a method of raising a revenue, a license to trade which affects a Dominion company in common with other companies. Somewhat tentatively they added that it might have been competent to the Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated in the province to register for certain limited purposes, such as the furnishing of information." One way of putting our case, of course, is that this Saskatchewan Statute has not the limited purposes which your Lordships had in mind there. It is for another purpose. We quite agree with Mr. Justice Brodeur that it is competent for the province to require a company to place on record certain information for the guid-

ance of persons in the province. "The Saskatchewan Statute applies to all companies whether incorporated in the province or otherwise. The registration required by section 23 does not *per se* as I read the Statute furnish any information, but it is enacted by section 34, that, not later than the 1st March in each year after its registration, the company shall furnish certain particulars to the Registrar, it is obvious, however, that the Statute was drafted with the purpose of bringing it well within the rules laid down in the John Deere Plow Company case, 1915, Appeal Cases, 330. I now come back to the question which I stated above—whether sections 23 and 25 compel the appellant companies to register and obtain a license as a condition of exercising their powers. My difficulty to answer this question in the affirmative is that, under the holding in the John Deere Plow case, the province can, for the purpose of raising a revenue, require a license to trade which affects a Dominion company in common with other companies. If so, it can impose a penalty for failure to take out the license." May I observe that the power to require a license is a very limited one as laid down by item 9 of section 92. If the power to impose a license had been unlimited, as is argued in these judgments, the power to tax would not have been necessary: "Can this penalty be imposed for each day during which the company carries on business without taking out a license? In as much as the province can for revenue purposes require the taking out of a license to trade, as decided in the John Deere Plow case, it follows that it can impose a penalty for trading without such license, and therefore for each day during which the unlicensed company carries on trade. This does not give to sections 23 and 25 of the Saskatchewan Statute the effect of compelling the appellant companies to register and to obtain a license as a condition of exercising their powers. These companies with all other companies are compelled to take out a license to trade and to pay therefor the fees prescribed by the Lieutenant-Governor-in-Council and their liability to pay the penalty is not due to the fact that they are exercising their powers under their charters, but that they are carrying on business without taking out a license to trade." That is what we say. It is the carrying on of business that is penalized. The scheme is very clever to join the two things together in this way, but essentially that is the thing aimed at.

VISCOUNT CAVE: Does it come to this. You may not say that the company shall not exercise its powers without taking out a license, but you may say if it exercises its powers without taking out a license it shall pay a penalty of 1,000 dollars a day? MR. WEGENAST: There might be still something to be said, but there must be a disjunction somewhere. There is a place where the province must stop.

VISCOUNT HALDANE: It raises this curious question: Can the province exercise its powers under section 92 tax a company out of existence? Could it impose a tax on a Dominion company differentially? MR. WEGENAST: Yes, so differentiated that it might not show a manifest intention of a policy of placing a handicap against the Dominion company.

VISCOUNT HALDANE: It might be that was not really an exercise of the power under section 92, but it was an attempt to infringe upon section 91, Regulation of Trade and Commerce, surreptitiously by an Act that was not genuine revenue legislation. MR. WEGENAST: Yes.

LORD PARMOOR: It is the test that it is Provincial Legislation that there is no differentiation. MR. WEGENAST: Yes, that is my point.

VISCOUNT HALDANE: Supposing there is no differentiation the tax may be enormous, but can you object to it when it is direct taxation under property and civil rights? Can you object to the province taxing all companies? MR. WEGENAST: I propose to come to that in a moment The differentiation may be valid, but if the differentiation is such as to disclose an ulterior object then as it was laid down in the Bryden case the Court will see the ulterior object.

VISCOUNT HALDANE: We shall have to look at the Bryden case when we come to it. MR. WEGENAST: Yes. Since the question of differentiation has been mentioned I do wish to call your Lordships attention, because this is a most convenient opportunity, to some of the cases in the United States Supreme Court reports.

VISCOUNT HALDANE: What upon? MR. WEGENAST: Your Lordships will find them of some significance as showing, not the way in which the distinction

would be made under the British North America Act, but as showing that the same problem of differentiation had to be dealt with under the American Constitution, and your Lordships will find it, I think, illuminating.

VISCOUNT HALDANE: We do not look with favour upon the citation of cases on the American Constitution as bearing upon the construction of the British North America Act. Not only are the schemes different, but they are approached from a different way, and the tendency which may have obtained in the Supreme Court of the United States may not be the tendency that obtains here, and we are not impressed by particular American decisions. MR. WEGENAST:, Of course, I bow immediately to your Lordships wish, but I know it has been done in this Court.

VISCOUNT HALDANE: They have been received with a considerable amount of criticism. We are always illuminated by a statement of great principles coming from American Judges, but their statements of principle can be made at the Bar. You can tell us what the principle is, and then we are in a position to judge whether the principle applies here, but to have thrown at our heads decisions of the Supreme Court of the United States we dislike, because the context has to be taken into account, and never is taken into account. MR. WEGENAST: May I defer that statement of principle to a later stage?

VISCOUNT HALDANE: Yes. MR. WEGENAST: Then I will go on with the judgment of Mr. Justice Mignault: "The appellants complain that the basis of the registration fee is the nominal or authorized capital of the company without regard to the amount paid thereon or the amount employed in the province." That is a very serious account of our criticism of this Statute, but I will come to that later: "This may be objectionable"—he does admit it—"but I cannot see how it can affect the question of jurisdiction." There the Bryden case comes in. It is with reference to that that I brought in the reference to the American cases: "I would, therefore, think that sections 23 and 25 of the Saskatchewan Companies Act are not *ultra vires,* and that the appeals of the appellant companies should be dismissed with costs."

VISCOUNT HALDANE: Let us summarize Mr. Justice Mignault's judgment. It really comes to this, that it is not status. It is the same ground in another form. MR. WEGENAST: Yes, my Lord. Mr. Justice Idington deals at once with the Saskatchewan and Manitoba cases, and I think it will be necessary, therefore, to read the Manitoba judgments in the lower Courts.

VISCOUNT HALDANE: I think we should rather like to read through the judgments of the Supreme Court first. We may have to come back to the others. MR. WEGENAST: If your Lorship pleases. We do rely very strongly on the judgment of Mr. Justice Purdue in the Manitoba Court. I did not want to pass it over.

VISCOUNT HALDANE: You will have to come to that, of course. Had we not better hear the judgment of the Chief Justice of Canada who has agreed with the judgment in the Manitoba case. Is it necessary for you to read the portions of the Supreme Court judgment at this stage which relate to anything except Saskatchewan. I think you might pass over the other things, and come back to them. MR. WEGENAST: If your Lordship pleases, except that Mr. Justice Idington gives one judgment about them both.

VISCOUNT HALDANE: We will see what he says, but you may miss out anything that is not purely Saskatchewan. MR. WEGENAST: If your Lordship pleases. Mr. Justice Idington says: "These appeals were by consent re-argued together, and they ought to be decided upon the same single neat point of law whether or not a local Legislature can tax an incorporated business company deriving its incorporation from the Dominion Parliament."

VISCOUNT HALDANE: I think there the learned Judge begs the question. MR. WEGENAST: Yes. He says afterwards that your Lordships should have decided the John Deere Plow case on that single neat point. "All the other issues attempted in argument to be dragged into the case seem entirely irrelevant. If the tax is paid the other issues become of no consequence for the purposes of the disposition of the litigation respectively involved in each case. The issuing of any more interrogatories on merely abstract points of law by the Dominion Government to this Court for purposes of information or of testing the limits of the powers of local Legislature in regard to some supposed assertion or possible assertion of power,

seems for the present to have reached the bounds of its toleration, yet that does not seem to have exhausted the resources of ingenuity on the part of others for we are invited to answer in some of these cases questions needless to answer if the power of taxation in question exists. The Legislature of Saskatchewan having due and proper regard to the fate which rightly befell some extremely unjustifiable British Columbia Legislation in the case of *John Deere Plow Company* v. *Wharton,* 1915. Appeal Cases, 330, decided to conform so far as it could to the decision in that case; repealed its old Statutes bearing upon the like questions (of which some are not involved herein) and enacted a new Companies Act wherein it incorporated a provision for registration and licensing of all corporate business companies and subjected all, whether of local organization under the Act, or of Dominion or of foreign origin, to an initiative and annual license fee of the same graduated scale fixing the amount to be paid in proportion to capital. It clearly did this by way of taxation which the appellants seek to escape. I know of no reason why they should not be subjected thereto or to why the place or origin should be a ground for freeing them from the common burden all should bear in support of the Government of the province—where they choose to carry on business—and seek the protection it gives." May I say at this point I was reading the notes of what was said yesterday and I think it is necessary for me to refer to the remark of my learned friend, Mr. Nesbitt, as to the issue being as to 35 dollars. Unless that was intended as a piece of forensic pleasantry I shall have to address myself very seriously to that.

MR. WALLACE NESBITT: I said a mimimum.

MR. WEGENAST: The minimum to start with is 100 dollars.

MR. WALLACE NESBITT: That is for Mortmain

MR. WEGENAST: My friend is referring to the condition of the Ontario Act before 1911. Since 1911 the fees have been the same for licensing in all the provinces as for the incorporation of a local company. It is an issue of the gravest possible importance to all Dominion companies.

VISCOUNT HALDANE: You have called attention to it. MR. WEGENAST: Yes, the fees amount to many thousands of dollars in the case of the companies involved in these cases.

MR. WALLACE NESBITT: In the case of these two companies?

MR. WEGENAST: In the case of these two companies. The learned Judge goes on at line 14: " Nor do I see any imperative reason for confirming the exercise of the taxing power to some Statute ear-marked as a taxing act "—that, of course, is not our argument either—" The questions of choice of subjects for taxation and equally of burden to be borne thereby, and best modes of enforcing payment thereof, have never yet been scientifically settled in a way satisfactory to those who have paid the greatest attention to such questions. What we have primarily to deal with is the single issue of whether the annual tax for the non-payment of which one of the companies has been penalized, falls within what is referred to in the British North America Act as ' direct taxation.' It seems to fall well within the decisions in the cases of *Bank of Toronto* v. *Lambe,* 12 Appeal Cases, 575, and the *Brewers and Maltsters' Association* v. *Attorney-General of Ontario,* 1897, Appeal Cases, 231, as being direct taxation." With all deference I cannot withhold the most direct denial of that statement.

VISCOUNT HALDANE: You say that is the very point? MR. WEGENAST: Yes, absolutely: " In the graduated scale as a basis for its application I cannot distinguish it from the former, and in the licensing fee as a mode of its imposition it seems to fall within the latter case. I cannot, where the power seems so clear, entertain as a valid argument, in answer to the judgment in the two first-named cases enforcing the penalties the objection that there are provisions in the Act claimed to be *ultra vires.* These collateral contentions seem wholly irrelevant to the single issue before us; so far at least as concerns the respective judgments for penalties. Their introduction seems but an attempt to becloud the real issue which is a very narrow one. As to the Harmer case, though not differentiated in the arguments from the other two, it occurred to me that possibly the introduction of some of these alleged objections was not so far fetched. In that we have to consider the basis upon which a shareholder is proceeding against his company for relief. I am, however, of the opinion that there is quite enough in the plaintiff share-

holder's complaint, when confined to the question of improperly incurring penalties by refusing to pay the tax and all implied therein, to maintain the action and the resultant judgment, without considering the other excuses for not doing so or contentions set up by either party. It seems to me that the same observations are applicable to the appeal in the Manitoba case. I observe, however, that there is a slight difference between the language used in the final clause of the case submitted to the Manitoba Courts. I shall revert to this in closing what I have to say. I agree entirely with the reasons assigned by the late learned Chief Justice of Manitoba and substantially with all advanced by Mr. Justice Cameron in support of the judgment of the Court of Appeal from Manitoba in the Davidson case. In deference to the argument presented herein I desire to point out that in my opinion a corporation by whomsoever or whatsoever power created, has no greater right in any province than a private individual enjoying full rights of citizenship and not personally disqualified in any way going there to do business"—of course, we admit that—" and in many respects has less, unless expressly given same by virtue of some legislative authority endowed with power to do so, for example, in the cases of banks and railway companies." We thought that the Dominion company *qua* company had been placed on the same basis by your Lordship in the John Deere Plow case. " If created by the Dominion authority its capacity must fall within what an exercise of the so-called residuary powers of the Dominion may create; unless in the cases specially provided for either expressly or impliedly in the enumerated powers of the British North America Act conferred on the Dominion. The G. W. Saddlery Company in question in no way falls within any of the latter." We thought your Lordships had held in the John Deere Plow case that it did.

VISCOUNT HALDANE: My recollection is that we did. You must bear in mind the power of section 92. It is power to make laws for the peace, order and good government of Canada that is conferred upon the Dominion. Out of that power was taken the enumerated things in section 92. Then there is the enumeration in section 91 which *per se* would be merely an expression of the general words to which I have alluded, but which are given their force and validity by the concluding words which say that everything that falls within the enumeration of section 91 is to prevail over the enumeration in section 92. MR. WEGENAST: Yes. Then your Lordships said there is only one case outside the enumerations of section 91 in which the Dominion Legislation has full effect as against Provincial Legislation. That is in what is called the Companies Reference in 1916.

VISCOUNT HALDANE: What was the exception, education? I think that to some extent comes in. MR. WEGENAST: May I read the sentence: " There is only one case outside the heads enumerated in section 91 in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject matter lies outside all of the subject matters enumeratively entrusted to the province under section 92."

VISCOUNT HALDANE: That is so, and one of those cases is education.. MR. WEGENAST: It may arise. I do not recollect that, but the incorporation of non-provincial companies is the one that was particularly dealt with.

VISCOUNT HALDANE: Education is dealt with by the special section which follows. In a certain contingency and in a very limited contingency only this power passes to the Dominion. MR. WEGENAST: Yes. In that case your Lordships were dealing with the power of incorporation.

VISCOUNT HALDANE: Speaking from memory that is my recollection, I may be wrong. MR. WEGENAST: I think that is so. In this case the question was as to whether the Dominion power to incorporate Dominion companies would prevail. At that point your Lordships rested the reasoning on the fact that the provincial power was limited to companies with provincial objects.

VISCOUNT HALDANE: Yes. MR. WEGENAST: So that the Dominion power would have full sway because of the limited nature of the provincial power. The passage I read is in 1919, 1 Appeal Cases.

VISCOUNT HALDANE: We need not go into that now, but there is nothing in section 91 which says anything about companies according to my recollection except as regards banks, so that you get it out of the initial words, peace, order and good government, and the reference to two of the enumerated heads in section 91, the

regulation of trade and commerce. MR. WEGENAST: Is not this so, that in that particular passage in the Insurance Reference your Lordship was resting it on the fact that the incorporating power of the province was limited to local companies, which clearly threw the incorporation of ultra-provincial companies into section 91.

VISCOUNT HALDANE: That left a gap which could only be filled by the initial words of section 91 as the general power. There the exercise of the residuary power retained by the Dominion which is most exclusive is purely by section 92 not extending to them, but also by the regulation of trade and commerce. MR. WEGENAST: Yes, that is how I understand the John Deere case decision. Going on with the judgment at page 11, line 18, Mr. Justice Idington says: "If created by the Dominion authority its capacity must fall within what an exercise of the so-called residuary powers of the Dominion may create; unless in the cases specially provided for either expressly or impliedly in the enumerated powers of the British North America Act conferred on the Dominion"—His Lordship has lost sight of that passage in the Insurance Reference—"The Great West Saddlery Company in question in no way falls within any of the latter. There is, therefore, no reason for relying upon any such implication as may arise in favour of the corporation created to execute the purposes of any of the said enumerated powers. It was suggested in argument that the judgment of the Judicial Committee of the Privy Council in the Wharton case had said the Dominion Companies Act rested upon item No. 2 of the said enumerated powers. I do not so read it. And after the numerous futile attempts theretofore made, before the said Court, to make that item relative to 'Trade and Commerce' subservient to the enlargement of the powers of the Dominion in relation to conferring extraordinary powers upon ordinary trading companies, I submit respectfully that any such expression if to be read as suggested, must be treated as *obiter dicta.*"

VISCOUNT HALDANE: There is more in what the learned Judge says than what appears at first sight. I have no doubt what he had in his mind was this. In *Russell* v. *The Queen,* a very old case about the liquor law, the second sub-head of section 91 was used as giving the Dominion power to make regulations with regard to the liquor laws of Canada of a very extended kind. Afterwards, it was said in subsequent decisions and notably by Lord Watson that the Judicial Committee which was then not as familiar with the British North America Act as it had become subsequently had gone upon a wrong tract in giving this extended meaning to the words "Regulation of Trade and Commerce." They base the decision in that case upon this ground. I think I may say—I had a long experience at the Bar of those cases in those days—that it was a tacit rule; a convention between judges and counsel that *Russell* v. *The Queen* was not to be cited, and we did not cite *Russell* v. *The Queen.* I think it has come back a little more into repute now, notwithstanding the remarks Lord Watson made upon it and regulation of trade and commerce as I think we said in the John Deere Plow case went to this that when the Dominion has once incorporated a company it can do business because the only restriction upon its powers is with regard to a company with provincial objects. That is by aid of the words "regulation of trade and commerce," it may say this company may trade freely, and it has a charter which gives it power to do so. MR. WEGENAST: His differs with—Yes; his Lordship considers that *obiter.*

VISCOUNT HALDANE: I think what he has in mind is that there had been a cloud about those words created by the excessive view taken in *Russell* v. *The Queen.* MR. WEGENAST: Of course, we do also object to his Lordship characterizing this power of the Dominion company as an extraordinary power. We hold out for no extraordinary power. We hold out for the status of a corporation.

VISCOUNT HALDANE: You say the province has power of legislation with regard to companies with provincial objects; here is a company which has not a provincial object, and, therefore, the residuary words of section 91 must give them power to create. MR. WEGENAST: Then after we are created and given our corporate powers we are willing to take our rank with the local company as regards all matters within the provincial jurisdiction. We expect no favoured treatment.

VISCOUNT HALDANE: Do you expect favoured treatment because it is open in the case of a provincial company to say you shall not trade at all, under "property and civil rights?" MR. WEGENAST: Yes.

VISCOUNT HALDANE: They could not say that to you. MR. WEGENAST: I am willing to admit, for the purpose of my argument, that they could.

VISCOUNT HALDANE: I will not take your admission if it amounts to the destruction of the status of a Dominion company to read the words so, as we pointed out in the John Deere Plow case according to my recollection; you put a more limited meaning on civil rights. It must be civil rights so as not to destroy any of the exclusive subjects of the Dominion Legislature. MR. WEGENAST: I do not want to give away anything, but I do not propose to put my case on such a ground as that.

VISCOUNT HALDANE: You need not do that. It is not necessary for you to make any admission upon it nor could we be bound by your admission. MR. WEGENAST: Then at line 36, page 11: "It was in no way necessary for the decision of the single neat point decided in the Wharton case. Moreover, we have, since that case, the expression of opinion by it in the insurance case *Attorney-General for Canada* v. *Attorney-General of Alberta,* 1916, A. C. 588, at p. 596, which seems to deny the power to rest any license thereon to carry on any "particular trade.'" There is another one of the disjunctions I wish to make. The province may be able to license a particular trade such as that of a shopkeeper or a soloon keeper or an auctioneer. Those are enumerated in item 9, and that is *ejusdem generis,* but not a license on corporate capacity surely, my Lord—not a license on corporate capacity conferred by the Dominion. That, we say, is not *ejusdem generis* of the class indicated in item 9 of section 92, and his Lordship loses sight of that distinction. Then at the bottom of page 11: "The pith of the said expression of opinion is contained in the following extract:—'There was a good deal in the Ontario Liquor License Act, and the powers of regulation which it entrusted to local authorities in the province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in *Russell* v. *The Queen.*" There, is what is running in his Lordship's mind as Lord Haldane has said.

VISCOUNT HALDANE: This is my language is it, he is quoting in the insurance case? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: My recollection is that I looked up what has never been reported, but which ought to have been and what I have a print of in my library, namely, a verbatim report of what happened in the Ontario Liquor License case, with regard to which much of the comment on *Russell* v. *The Queen* is made, and what I say there was influenced by what I did. I was in the case as counsel, and I have a report containing a full report of the proceedings. It is not reported in the Law Reports here, and I do not know whether it has been reported in Canada or not. MR. WALLACE NESBITT: Your Lordship will remember we dug up the McCarthy Act discussion. I think your Lordship took it away with you. I do not think there is any other copy.

VISCOUNT HALDANE: I think I have my private copy in my library. MR. NESBITT: Was it printed?

VISCOUNT HALDANE: I am sure I did not appropriate yours, Mr. Nesbitt. MR. WALLACE NESBITT: It has been missing ever since, my Lord.

VISCOUNT HALDANE: I had one of my own always. MR. WEGENAST: I think there is one in the Canadian Library here, my Lord.

VISCOUNT HALDANE: This is what is referred to. Now will you kindly read it to us? MR. WEGENAST: "But in *Hodge* v. *The Queen* (9 App. Cas. 117) the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario Statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board though without giving reasons that the Dominion licensing Statute known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by section 91."

VISCOUNT HALDANE: Now if *Russell* v. *The Queen* was rightly decided the McCarthy Act was *intra vires,* but we held it was *ultra vires* and we gave no reasons, as I have indicated to you why. MR. WEGENAST: Yes, my Lord. Their Lordships think that as the result of these decisions it must (now) be taken that the authority to legislate for the regulation of trade and commerce does not extend to

the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces." But, my Lords, this is not a question of licensing a particular trade. I would go so far as this. I have offered to give away part of my argument, but here is something that I really should like to reach out for. If the province did, as the Province of Saskatchewan did at one time, bring under its Act an enumeration of trades seriatim and practically exhausting the trades in which companies might engage in the province, and subject them to a tax which discriminated against the Dominion company, then I would urge there was an ulterior purpose behind it.

VISCOUNT HALDANE: You would say in that case that it did come within regulating trade and commerce. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: I think that is probably true, and it is what we say in effect there. MR. WEGENAST: Then: "This express declaration of the Court above relevant to the non-existence of the power claimed for the Dominion so far rested upon the enumerated item of 'Trade and Commerce' seems to be conclusive against the contention of appellant, for it is only by virtue of something alleged to rest upon said item the mysterious right is asserted." Well, his Lordship perhaps is entitled to characterize it as a mysterious right—"if the Dominion cannot assert the power claimed for it by way of an express license, much less can it do so by mere incorporation giving specified rights to certain parties to trade in a corporate capacity." But his Lordship loses sight entirely of another passage in the John Deere Plow Company's case, at the close where it is stated that the word "Incorporation" must be deemed to have a wider meaning than that which is urged by the province in the John Deere Plow Company's case; that it must give something substantial and not merely the corporate capacity. Then: "The legal entity must submit to the same laws properly enacted by and within the powers of a provincial Legislature as the private individual"—that is right enough; we quite agree to that. "The power to impose a tax and enforce its collection by means of prohibition to trade until it has been paid and its payment evidenced by a license has been asserted and upheld especially in relation to the manufacture and sale of liquor"—quite so; of course, my Lord, a particular trade—"in so very many ways that one is surprised to hear the argument now put forward that the doing so is to be treated as an improper assertion of power and a denial of anything more than it means. Though the testing of the power has been more in evidence before the Courts in relation to the liquor traffic than any other the successful assertion of the power has been asserted in manifold ways by Provincial Legislation ever since Confederation." The meaning of that is clear—"Much of that has been asserted through the powers given the municipalities, which again rests upon Item No. 9 of section 92 of the British North America Act as to the licensing power as a means of raising revenue." Of course, there is this further——

VISCOUNT HALDANE: That is within the province. That is really what the provincial license has been enacted under. MR. WEGENAST: But even if we could find an ulterior purpose not assignable to revenue there would be another reason for arguing it was invalid.

VISCOUNT HALDANE: Yes; institutions and local matters within the province; these are enough to cover control of the liquor trade? MR. WEGENAST: Yes, my Lord, and even perhaps revenue, because the municipality must have the revenue after all.

VISCOUNT HALDANE: Yes, but really it does not matter. It might be covered. MR. WEGENAST: Then: "The taxation of transient traders by municipalities—a very old form of tax—and sometimes of the travelling circus, would be an illusory thing if the collection was not enforced by prohibition of carrying on the business of him so liable." Now his Lordship wants to take the Dominion company as if it were a transient trader without a home in this province.

VISCOUNT HALDANE: It is plain that under the regulation of trade and commerce you cannot say you may carry on a particular trade in a particular province, but it is quite a different thing to say that a company incorporated with the Dominion has not a status to enable it to trade where it likes subject to observing the general laws of the province. MR. WEGENAST: It at once stigmatizes the

legislation to find the analogy drawn between this company and a transient trader, a circus company. My Lords, we are at home in this province. It is our home.

LORD PARMOOR: Some of the words go a little further. So long as what is called status, whatever that includes, is not impinged upon, then you can deal with the company like you can with any other individual as regards provincial matters.

MR. WEGENAST: I should not admit that, my Lord.

LORD PARMOOR: No, but that seems to be what the learned Judge is saying?

MR. WEGENAST: Yes, my Lord, but we say the John Deere Plow Company's case goes further than that. We say that it is for the Dominion to make the Dominion company's company law.

VISCOUNT HALDANE: Your criticism on this judgment is that it is confined to bare incorporation. The Judge says that the status is limited and confined to little more than a bare expression. MR. WEGENAST: Your Lordship said in the John Deere Plow Company's case——

VISCOUNT HALDANE: I am only saying that is your criticism of the judgment.

MR. WEGENAST: Yes, my Lord. Then: "I only present these casual illustrations as a test of the possible need of the power to prohibit the carrying on of business until the tax may have been paid, in order to render it effective, of which no reasonable person, speaking of its possible exercise in relation to such cases, would be likely to deny." Well, we may be unreasonable, but we do deny it.

VISCOUNT HALDANE: There may be a question there. MR. WEGENAST: "A judicial creation of a mere theoretical power to tax without any potentiality of its enforcement is apparently the high aim of the appellants." Well, it is really that sort of thing, my Lords, that caused us to place before your Lordships a specimen of the kind of Acts that we freely admit the province could pass and make utterly effective against us. Then: "There would not seem to be in principle any difference in the quality of the powers invoked whether exercised in relation to such transient or others presenting greater promise of permanency. Yet the transient trader or the circus man might easily become incorporated and often is in fact."

MR. WALLACE NESBITT: You did not read the last paragraph on page 12?

MR. WEGENAST: I am obliged to my learned friend. "But so long as the decision in *Citizens' Insurance Co.* v. *Parsons,* 7 App. Cas. 96, and all involved therein stands as good law the power of the Provincial Legislatures over contracts will remain what it was always intended to be." Well, that, no one denies, although there is an expression in the *Citizens' Insurance Co.* v. *Parsons* case which I think your Lordships will concede as being displaced by the John Deere Plow Company's case. It was said in the *Citizens' Insurance Co.* v. *Parsons* case that the Dominion gave the company its capacity, but it was rather implied that in everything except its metaphysical attributes the company might be subject to provincial legislation. That, of course, is displaced by the decision in the John Deere Plow Company's case, and the principle is re-stated in the Insurance Reference. That is to say, that the company gets something more than the metaphysical attributes, the mere capacity; it gets a substantial right—a franchise in other words. Then my Lords, at line 4, page 13: "Yet the transient trader or the circus man might easily become incorporated and often is in fact. Are we to say incorporation by virtue of the Dominion legislation inherently carries with it a greater sanctity than any other?" Of course, we say if we were running a circus we would certainly be subject to provincial laws licensing circuses as being of the genus laid down in Item 9. Then: "We do not know from the record herein that the 'John Deere Plow Company, Limited,' one of the appellants herein became so incorporated on the application of four gentlemen of Moline in the State of Illinois, one of the United States of America, and a dealer in Winnipeg. Why should such a legal entity be entitled to claim, merely because so created by virtue of Dominion Legislation professing only so to create, and not pretending thereby to confer greater rights to trade anywhere in Canada, than any mere private individual citizen of Canada possesses that it has such superior rights."

VISCOUNT HALDANE: It comes in at the end. MR. WEGENAST: But the Dominion Company's Act in terms purport to give those active rights.

VISCOUNT HALDANE: Yes, but what he is saying is this: Why should the Dominion have power to give larger rights than any private citizen. I do not

understand you to be saying that? MR. WEGENAST: No, my Lord, but does not he say that the Dominion did not profess to give it anything more than to make it a legal entity.

VISCOUNT HALDANE: It may be that he is saying he is claiming rights beyond what the Dominion gave it. I am not quite sure. It is very obscure. MR. WEGENAST: All I wish to say at the moment is that the Dominion did purport to give this company more than a legal entity. He says not. Then: "The questions submitted are not necessary for the determination of the single issue which the pleading presents in either the Harmer case from Saskatchewan or the Davidson case from Manitoba. Each plaintiff is entitled to succeed by reason of the company attacked defying the law of the province in question and thereby becoming liable to penalties and possibly more serious consequences. I am strongly impressed with a suspicion begotten of circumstances coming under my observation in these proceedings."

VISCOUNT HALDANE: Need you read the rest of this judgment? This is quite another matter. It does not deal with the merits. It is only a complaint that this action has been used to fish out of the Court abstract opinions. MR. WEGENAST: May I say in a word that these cases are representative cases, typical cases selected from the cases.

VISCOUNT HALDANE: If you desire to read the rest it should be done as quickly as you can, but really there is nothing in it, and it does not bear on the point we are dealing with. MR. WEGENAST: I do not wish to leave anything unsaid to remove any impression that these cases are not cases of the most grave consequence.

VISCOUNT HALDANE: Nothing turns upon the last part. Now the case refers to the Manitoba case, to which we have not got yet. MR. WEGENAST: Yes, my Lord. If your Lordships wish I will go on with the Manitoba or the Ontario case first. They are on all-fours practically.

VISCOUNT HALDANE: Which do you think would assist us most. The Manitoba covers the Ontario case, does it not? In Manitoba there is one Act? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: And we shall have to read all three if we take Ontario? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: I would like to consult Mr. Nesbitt about this; what do you say Mr. Nesbitt? MR. WALLACE NESBITT: If your Lordship asks me, I rely upon the judgment of the Chief Justice of Ontario more than upon any other judgment in the Courts below. I refer to the judgment of Chief Justice Meredith, not only on account of his very long experience——

VISCOUNT HALDANE: So that you would prefer to take the Ontario case first? MR. WALLACE NESBITT: Yes, my Lord. It is the most thoroughly reasoned out judgment of all the judgments in the Courts.

VISCOUNT HALDANE: I think that is very reasonable Mr. Wegenast. MR. WALLACE NESBITT: I shall place most reliance upon it. He was through all these fights your Lordship; was counsel in for many years as leader, and he knows a good deal about the subject.

VISCOUNT HALDANE: Is your case, in a word, that Ontario refrains from interfering with status in regard to any tax? MR. WALLACE NESBITT: Yes, my Lord, we say that the moment you pay that small tax you can exercise any and every privilege you please. It is a question of whether they get it before or after. If we tax through the sheriff we have, of course, a right to collect. If you pay now you may take a license and that is the evidence of the receipt.

VISCOUNT CAVE: You cannot really refuse the license? MR. WALLACE NESBITT: Yes, my Lord.

VISCOUNT CAVE: Therefore it differs from Saskatchewan? MR. WALLACE NESBITT: They seem to me to be quite different in a way.

MR. HENN COLLINS: There is no power in Saskatchewan to refuse the license.

MR. WEGENAST: They are all on a parity in that respect.

VISCOUNT CAVE: What section is that, Mr. Henn Collins? MR. HENN COLLINS: It is section 25, my Lord: "Every company, except a company incor-

porated under section 22 of this Act, may, upon complying with the provisions of this Act and the regulations, and every mutual insurance company may, receive a license from the Registrar to carry on its business and exercise its powers in Saskatchewan."

MR. WEGENAST: It is 24, my Lord, the second paragraph of section 24, which clearly indicates that the Dominion company cannot be refused registration.

VISCOUNT CAVE: But I am speaking of a license? MR. HENN COLLINS: I thought your Lordship was speaking with regard to the license. Is that section 25?

VISCOUNT CAVE: You read "may" as meaning "shall?" MR. HENN COLLINS: Yes, my Lord.

MR. WEGENAST: I assumed it did mean "shall." I have assumed all through it meant "shall." I assumed that the Dominion company could get a mandamus.

LORD PARMOOR: It is the same thing on 24 and 25; it is "may" in both cases. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: I do not see why a provision that every company must be registered provided that is all, should not be valid under property and civil rights if it applies to all companies. MR. WEGENAST: Not registered for the purpose of establishing the corporate status, my Lord.

VISCOUNT HALDANE: Having for its object or part of its object the carrying on of business in Saskatchewan. There must be some mistake there I think. No, perhaps it is all right, having gain for its object and carrying on of business in Saskatchewan. Now why should there not be an enactment that every company which did these things should be registered? MR. WEGENAST: I admit that, as your Lordship has stated it in the John Deere Plow Company's case for certain limited purposes, but not for the purpose of establishing its corporate status.

LORD PARMOOR: Is not your point or the point against you rather that so far as the status is not affected there is no harm in the proposal—the Dominion status I will call it to make it quite clear. MR. WEGENAST: That is another way of putting the point which your Lordship put to me a few moments ago. I would admit that on that point, but I say there is the further question of an interference with this company's law—the inherent law of its being——

VISCOUNT HALDANE: That is what Lord Parmoor means.

LORD PARMOOR: Yes, that is so. MR. WEGENAST: If Lord Parmoor includes that in the word "status" then I could not admit it; if that is included in what is conceived by the word "status."

LORD PARMOOR: Take registration pure and simple, and nothing else, and the province desires to register, but leaving the whole status unaffected. MR. WEGENAST: We admit that at once, my Lord. There is an Act in the Province of Quebec to which I could refer your Lordship in which the company is required to file with the prothonotary of the judicial district a statement, giving the name of the company, who is its agent in the province, and other information that one can imagine might be desired, with the payment of the nominal fee for the registration, and no one has suggested that is not perfectly proper and valid. But it is not for the purpose of securing a sanction for the company's corporate operations as a corporation. Then my Lord, on page 41 of the portion of the record marked "M" is the judgment of Mr. Justice Masten.

VISCOUNT HALDANE: Have we got enough before us of the nature of the Ontario Act to follow it? MR. WEGENAST: Yes, my Lord, I think I went over all the provisions.

MR. WALLACE NESBITT: Yes. At any rate when you come to Chief Justice Meredith's judgment he collects every section.

MR. WEGENAST: Your Lordships will also find it in Mr. Justice Masten's judgment as well.

VISCOUNT HALDANE: Where is that? MR. WEGENAST: It is on page 41 of "M": "These actions were heard before me at the non-jury sittings at Toronto on March 26th and 17th, 1917. They are friendly actions brought for the purpose of determining as the principal question the constitutionality of the Ontario Statute known as "The Extra-Provincial Corporations Act" in its relation to companies incorporated by Dominion authority under the Canada Companies Act, and secondly, but as an independent question, the right of a company incorporated

under federal authority to hold lands in Ontario without license. Each action was heard on a special case agreed between the parties and the two actions were argued together. At the opening of the argument Mr. Wegenast, for the defendant in the section action, moved summarily to dismiss it."

VISCOUNT HALDANE: There is nothing in that. MR. WEGENAST: No, my Lord.

LORD PARMOOR: The main point is at line 20, I think. MR. WEGENAST: Yes, my Lord: "On the main question, namely: Is the Act in question in its relation to companies incorporated under Dominion authority within the powers of the Province of Ontario? I am of opinion that the answer must be in the negative. The Harris Lithographing Company, Limited, is incorporated by letters patent under the Canada Companies Act. The letters patent purport to authorize it to carry on throughout Canada the business of dealers in stationery and also the business of lithographing, printing, engraving, embossing and manufacturing"—it was not stated there, but it is a fact that the company carries on business in three provinces—"Under section 5 of the Canada Companies Act, the company in question is constituted by virtue of its incorporation a body corporate and politic, and there is thereby vested in it power to sue and be sued, to contract by its corporate name and to acquire and hold personal property for the purposes for which the corporation is created (see Interpretation Act, Canada, 1906, section 30). Section 29 of the Canada Companies Act provides that on incorporation the company is to be vested with (among other things) all the powers, privileges and immunities, requisite or incidental, to the carrying on of its undertaking. It thus appears that there purports to be vested in the company in question power to carry on throughout Canada the business of stationers and lithographers, and I think that such power has been validly and effectively conferred on this company because 'the power to regulate trade and commerce at all events entitles the Parliament of Canada to prescribe to what extent the powers of companies, the objects of which extend to the entire Dominion, should be exercisable'"—that is from your Lordship's judgment in the *John Deere Plow Company* v. *Wharton's Case*—"The Dominion possesses the exclusive authority to confer such powers on a company of this class, and having so conferred them the Province of Ontario has no jurisdiction to destroy them or by legislation directed at this Dominion company as such to deprive it of its status and powers. Turning now to the Ontario Act here in question, section 7 provides as follows: '(1) No extra-provincial corporation coming within class 7 or 8 or 9 shall carry on within Ontario any of its business unless and until a license under this Act so to do has been granted to it, and until such license is in force; and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial corporation, carry on any of its business in Ontario unless and until such corporation has received such license and unless such license is in force.'" Your Lordships will there recognize the language of the British Columbia Statute. Then: "'(2) Taking orders for or buying or selling goods, wares and merchandise by travellers or by correspondence, if the corporation has no resident agent or representative or no office or place of business in Ontario, shall not be deemed a carrying on of business within the meaning of this Act.' Class 8 is defined as : 'Corporations created by or under the authority of an Act of the Dominion of Canada, and authorized to carry on business in Ontario.' In my opinion this section gives the key note of the Act: its 'pith and substance' and its purpose as applied to the defendant company, is to preclude it from the exercise of some of its powers and to deprive it of its status in the Province of Ontario unless and until it files certain documents, pays certain fees and takes out a license. I am of opinion that it was not within the power of the Provincial Legislature to enact this provision (section 7) in its present form. However simple may be the process of procuring a license, however slight may be the delay occasioned to the Dominion company, it is yet an illegal interference which purports for the time being (no matter how short) to prevent the company from exercising its legal powers and to deprive it temporarily of its status. It is attempted to support the legislation on the following grounds: (1) that it is provincial legislation enacted under section 92 of the British North America Act with respect to licenses in order to the raising of revenue by direct

taxation; (2) as legislation dealing with property and civil rights and particularly from the point of view of Mortmain; (3) as legislation dealing with the administration of justice in providing for the appointment of an agent, service of process, etc.; (4) and in providing for the making of returns; (5) as legislation prescribing penalties to enforce these provisions; (6) and generally as legislation affecting property and civil rights and dealing with matters of merely local consequence. See judgment in Cameron, J., in *Davidson* v. *Great West Saddlery Co.*, at p. 15. But while all these aspects present themselves in the Ontario Statute in substantially the same manner as in the Manitoba Act"—your Lordships will appreciate that the Manitoba case had been decided in the Court of Appeal before this was brought—"yet they are in my opinion ancillary and supplementary to the provisions of section 7 above quoted. I think that the main purpose of the Act here in question is to assert and acquire a direct control over every company before permitting it to carry on its business in the province; and until compliance has been yielded to the provincial license requirements to exclude the company from the exercise within the province of some of the powers conferred upon it by the Dominion authority. Such provisions are effective as against foreign companies but not as against Dominion companies, who are by their constituting instruments authorized to carry on their operations throughout every province of Canada. I think that the purpose above described permeates the whole of the Act in question in such a way as to render it impossible to hold that certain sections of the Act are valid and others invalid. The very full argument that was addressed to me merits, perhaps, a more extended discussion, but all phases of the question having been elaborately discussed not only by the Privy Council in the case of *John Deere Co.* v. *Wharton* (1915), Appeal Cases 330, but subsequently by the Appellate Courts of Manitoba and Saskatchewan in the cases of *Davidson* v. *Great West Saddlery Company, Harmer* v. *Macdonald Company,* I am unable after a careful perusal of these judgments to add anything that seems likely to assist the elucidation of the subject. I may, however, state generally, that my views accord with those expressed by Mr. Justice Perdue in the Great West Saddlery case. I do not think that the Ontario Act differs from the Manitoba Act in such a way as to yield any different conclusions from that at which he has arrived." The only difference to which my attention has been directed is the inclusion in the Ontario Act of sub-section 2 of section 9, which is as follows: 'No limitation or condition shall be included in any such license which would limit the rights of a corporation coming within class 7 or class 8, to carry on in Ontario all such parts of its business and to exercise in Ontario all such parts of its powers as by its Act or charter of incorporation it may be authorized to carry on and exercise therein.' I do not find any corresponding section in the Manitoba Act, and while the clause above quoted is in some measure palliative, it does not go to the root of the difficulty in such a way as to prevent wholly that which I think to be an illegal interference by the Province of Ontario with Dominion legislation. I, therefore, answer the questions submitted as follows: (a) In the case of *Currie* v. *Harris Lithographing Company.*"

VISCOUNT HALDAND: That is not a case we had before us, is it? MR. WEGENAST: Yes, my Lord, one was the case of *Currie* v. *Harris Lithographing Company* and the other was the case of the *Attorney-General of the Province of Ontario* v. *The Harris Lithographing Company, Limited.* They were both before your Lordship. The one was a shareholders case and the other one was brought afterwards by the Attorney-General.

VISCOUNT HALDANE: They were all brought up with the Great West Saddlery Company's case? MR. WEGENAST: Yes, my Lord, they are all consolidated, that is before this Court. They were not consolidated before the Supreme Court of Canada.

LORD SUMNER: Is this section 9 right of the Ontario Act? MR. WEGENAST: Yes, my Lord, sub-section 2 of section 9.

LORD SUMNER: It is not the Extra-Provincial Corporation Act. MR. WEGENAST: Yes, my Lord, it is in the rear of that book with the blue cover.

LORD SUMNER: Yes, I have it now. MR. WEGENAST: Instead of having the provisions about extra-provincial companies as a department of the Companies Act as in Manitoba and Saskatchewan, in Ontario they form a separate Act. One of

our points is that the Acts are *in pari materia.* Then at line 8, page 45, the judgment continues, "(1) I am of opinion that the provisions of the Extra-Provincial Corporations Act of Ontario in so far as they purport to apply to the defendant company are *ultra vires* of the Legislature of the Province of Ontario. (2) I am of opinion that the defendant company is not precluded by reason of not being licensed under the said Extra-Provincial Corporations Act from carrying out its objects and undertakings in the Province of Ontario. (3) I am of opinion that the defendant company is not subject to the penalties prescribed by the Extra-Provincial Corporations Act for carrying on business without being licensed. (4) I am of opinion that the defendant company is incapacitated and prohibited from acquiring (occupying) and holding lands in the Province of Ontario, but that such incapacity and prohibition arises from the provisions of the Mortmain and Charitable Uses Act (c. 103, R. S. O. 1914). If the defendant obtained a license under the provisions of the Extra-Provincial Corporations Act it would thereby receive authority to hold lands in Ontario in accordance with the provisions of section 12 of the Act in question. But the Extra-Provincial Corporations Act does not by itself specifically prohibit the defendant company from holding lands though section 7 above quoted carries with it a general prohibition." Your Lordships will note that is all he says about Mortmain provisions or land holding provisions as we call them, which raises a very important issue. He does not go into the reasoning of that question.

VISCOUNT HALDANE: This is so far in your favour. MR. WEGENAST: Yes, my Lord, except on the question of holding land. Then in the other case, the case of the Attorney-General of the Province of Ontario and the Harris Lithographing Company, Limited, he answers the question as follows: "(1) I am of opinion that the provisions of the Extra-Provincial Corporations Act, R. S. O. 1914, ch. 179, are *ultra vires* of the Legislature of the Province of Ontario, and that none of the provisions of the said Act, as now drawn, are valid. (2) I am of opinion that the defendant company is not precluded from carrying out its objects and undertakings in the Province of Ontario unless and until it shall have been licensed under the Extra-Provincial Corporation Act. (3) I am of opinion that the defendant company is not subject to the penalties prescribed by the said Extra-Provincial CorporationsAct for carrying on business without being licensed. (4) I am of opinion that the defendant company is incapacitated from acquiring and holding lands for the purpose of its business in the Province of Ontario by virtue of the Act known as the Mortmain and Charitable Uses Act, R. S. O. 1914, ch. 103. I am further of the opinion that such incapacity and prohibition does not arise by reason of its not being licensed under the said Act, though if it were licensed its capacity would be removed."

Now, my Lord, I should like to call your Lordships' attention to the formal judgment in this case which raises the issue from Ontario. It is on page 46, the formal judgment of the Supreme Court of Ontario.

MR. WALLACE NESBITT: No, that is in the Court of Appeal.

VISCOUNT HALDANE: It is an appeal judgment. MR. WEGENAST: Yes, my Lord, it was varied. But perhaps I may go on with the reasons for the judgment.

VISCOUNT HALDANE: Yes, I think so. MR. WEGENAST: There is a passage in the formal judgment which is very important. In the first place they declare on page 47 the provisions to be *intra vires*, "except the following words of section 16."

VISCOUNT HALDANE: Where is that? MR. WEGENAST: It is near the top of page 47, my Lord, about line 8, "This Court doth declare that the provisions of the Extra-Provincial Corporations Act of Ontario, being Revised Statutes of Ontario, chapter 179 as amended by 4 George V., chapter 21, section 38, in so far as they purport to apply to the defendant company are *intra vires* of the Legislature of the Province of Ontario except the following words of section 16, sub-section 1 of the said Act: "And as long as it remains unlicensed it shall not be capable of maintaining any action or other proceeding in any Court of Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of said section 7, "and doth adjudge the same accordingly." That is to say the rest of the Act is upheld, but this section which purports to incapacitate the company from suing and being sued.

MR. WALLACE NESBITT: Will it inconvenience you, Mr. Wegenast, if I point out that it is apparently a mistake on the part of some official, because if you look at section 16 the prohibition only refers to these companies under class 9, but does not refer to the Dominion companies at all.

Nowhere is there a prohibition against their suing. That is apparently some curious mistake.

VISCOUNT HALDANE: You are referring now to sub-section (1) of section 16.

MR. WALLACE NESBITT: Yes, my Lord, "And as long as it remains unlicensed it shall not be capable of maintaining any action."

VISCOUNT HALDANE: That is hardly what I am dealing with. MR. WEGENAST: It says: "Coming within class 7, 8 or 9."

MR. WALLACE NESBITT: No. It is some curious mistake. Do you think it was the Registrar's mistake?

VISCOUNT HALDANE: This is not a verbatim quotation from the section. MR. WEGENAST: It was formally discussed in the Court of Appeal. I am not at the moment able to account for the mistake, if it is a mistake, as apparently it is. Well, it was not discussed in this way, my Lords, that we took exception to that provision as identifying the Act, and as dealing with status, but the Chief Justice in his judgment undertook to deal with that specially. We did not invite him to do so.

MR. WALLACE NESBITT: I do not think we discussed that below.

MR. WEGENAST: No, I do not think it was discussed with a view to getting any such exception.

MR. WALLACE NESBITT: Or I should have at once drawn their attention to that if that had been referred to.

VISCOUNT HALDANE: Very well. MR. WEGENAST: Now, your Lordships will observe that in the next section the Court declares that the sub-section (1) "of the Act in so far as it purports to enact the words therein above mentioned is *ultra vires.*" Then in paragraph 3: "And this Court doth further declare that the defendant company is precluded by reason of not being licensed under the said Extra-Provincial Corporations Act from carrying out its objects and undertakings in the Province of Ontario." I would draw your Lordships' attention to this, that it certainly is an interference with the powers of the company when it is adjudged to be precluded. Then it is also declared to be subject to penalties. Then in paragraph 5, "This Court doth further declare that the defendant company is incapcitated and prohibited by reason of not being licensed from occupying and holding lands in the Province of Ontario." And it is enjoined. In paragraph 6, "And this Court doth further order and adjudge that the above named defendant and its directors, agents and servants be and they are hereby restrained from continuing to carry on business in the Province of Ontario without being licensed under the provisions of the said Act."

VISCOUNT HALDANE: That must be on the ground of property and civil rights. MR. WEGENAST: Yes, my Lord, it must be.

VISCOUNT HALDANE: We shall see about that when we come to it. The Chief Justice must have meant that the jurisdiction as to civil rights enable the province to say that no company—making no distinction between them—was to carry on business without a license. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: If that was right that is not merely finance. MR. WEGENAST: "And from occupying or holding lands." It is even "from occupying or holding lands." The company is restrained "from occupying or holding lands or any interest therein in the said Province of Ontario until"—and here is a significant thing—"until duly authorized so to do by the Province of Ontario." As if the Province of Ontario were a private person entitled to bargain for these rights.

VISCOUNT HALDANE: Is that all we need see on that? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Now let us get to the judgment of the Chief Justice. MR. WEGENAST: It is in the Appellate Division, my Lord.

VISCOUNT HALDANE: Where is that, because I cannot find it. MR. WEGENAST: It is on page 21, my Lord.

MR. MOSS: If I may intervene for a moment in regard to that section 16, which was referred to by my learned friend, Mr. Nesbitt, in the Act as printed in the Revised Statutes of Ontario, it does apply to all cases. I think it is in your printed copy.

VISCOUNT HALDANE: It may be or it may not be, but it is obviously wrongly quoted there. When you turn to the Ontario Act it refers, not to Dominion companies, but to other companies. MR. MOSS: That is what I was saying, my Lord. I have here the revised Statutes of Ontario. This copy that you have before you is a copy which includes subsequent amendments.

VISCOUNT HALDANE: We want the matter as it stood at the time of this litigation. MR. WALLACE NESBITT: In any event, the amendment would be in 1900, many years before this.

VISCOUNT HALDANE: We want to know what the Statute was which was before the Court at the time. MR. WALLACE NESBITT: This is what I argued from.

VISCOUNT HALDANE: The one in the book. MR. WALLACE NESBITT: Yes, my Lord.

VISCOUNT HALDANE: Then that was the law as it stood when the proceedings were commenced. MR. WALLACE NESBITT: I think so, my Lord.

MR. MOSS: I think not.

VISCOUNT CAVE: It is not the real Statute. MR. WALLACE NESBITT: My learned friend says it is a compilation. No doubt that is so, and not the Revised Statute at all. The Revised Statute was in 1914. However, I will look at that, but it has been assumed this is the Statute throughout.

VISCOUNT CAVE: Our copy is in 1914, and that has the word "it" as quoted.

VISCOUNT HALDANE: As quoted here.

VISCOUNT CAVE: Yes. MR. WEGENAST: However, we may perhaps look it up.

VISCOUNT HALDANE: Will you tell us definitely before this case finishes what was the actual section which was before the Court. As it is quoted here, or was it what you have in your book? MR. WEGENAST: It was not what I have in my book. It was the official copy of the Statutes.

VISCOUNT HALDANE: It was as in the judgment. The judgment is correct then? MR. WEGENAST: I am not at the moment able to say whether there were not some amendments after 1914 which are embodied in this blue-covered book. We shall have to ascertain that.

VISCOUNT HALDANE: All we want to know is what was the Statute on which the judgment is given, and we ought to be able to know that. With regard to those words at page 47 of "M" do they accurately state the section which was before the Court? MR. WEGENAST: I cannot say for the moment, my Lord, but I will tell you later. We will ascertain that.

VISCOUNT HALDANE: Yes, because it is very important. MR. WEGENAST: Yes, my Lord. Now, if I may go on with the judgment of the Chief Justice of Ontario at page 21, your Lordship will see, "The Attorney-General for Ontario and the plaintiff Currie appeal from the judgment of Mr. Justice Masten, dated 15th August, 1917, so far as it is adverse to them, and the defendant's appeal from it in so far as it is adverse to them and the Attorney-General for Canada supports the latter appeal." There were cross appeals. The companies appealed against the finding as regards the holding of land. Then, "The appellant company was incorporated by letters patent issued under the authority of the Companies Act (R. S. C., c. 79), for trading purposes, and it is now carrying on its business in Ontario from its chief place of business in Toronto—that being the chief place of its business designated in the letters patent. For the purposes of its business, the company has occupied, and is occupying, land in Toronto owned by Samuel Harris, one of its directors, under a lease to the company from him. Section 29 of the Companies Act provides that the company may acquire, hold, mortgage, sell and convey any real estate requisite for the carrying on of the undertaking of the company, and section 30 of the Interpretation Act (R. S. C., c. 1), provides that: 'In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall: (*a*) Vest in such corpora-

tion power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal, to alter or change the same at their pleasure to have perpetual succession, to acquire and hold personal property and movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure." The rest of the section is not in point. Then going on at line 22, "A special case has been stated by the parties, and from the statement of facts mentioned in it, I have made the foregoing statement of the material facts. According to the special case, the questions for the opinion of the Court are: "1st. Whether the provisions of the said Extra-Provincial Corporations Act (R. S. C. 1914, c. 179), or any of them in so far as they purport to apply to the defendant company are valid and *intra vires* of the Legislature of the Province of Ontario. 2nd. Whether the defendant Company is precluded from carrying out its objects and undertakings in the Province of Ontario unless and until it shall have been licensed under the said Act. 3rd. Whether the defendant company is subject to the penalties prescribed by the said Extra-Provincial Corporations Act for carrying on business without being licensed. 4th. Whether the defendant company is incapacitated or prohibited by reason of not being licensed as required by the said Act from acquiring and holding lands for the purpose of its business in the Province of Ontario." By the judgment *a quo* the first three questions are answered in the negative and the fourth in the affirmative. The appeals raise two very important questions, (1) as to the constitutionality of the Extra-Provincial Corporations Act (R. S. O., c. 179, as amended by 4 Geo. V., c. 21, s. 38), in so far as they assume to affect companies incorporated by or under the authority of the Parliament of Canada, and (2) as to the right of a trading company where authorized by the Parliament of Canada to hold land in a province for the carrying on of its undertaking to do so without a license in Mortmain of the Crown in right of the province whose laws prohibit the holding of land without such a license. The provisions of the Extra-Provincial Corporations Act relevant to the inquiry are section 4, which provides that 'corporations created by and under the authority of an Act of the Dominion of Canada and authorized to carry on business in Ontario,' shall be required to take out a license under the Act. Section 5, which provides such a corporation upon incorporation 'shall upon complying with the provisions of this Act and the regulations receive a license to carry on its business and exercise its powers in Ontario.' Section 7, which provides that no such corporation 'shall carry on within Ontario any of its business unless and until a license under this Act so to do has been granted to it, and unless such license is in force.' Section 9, which provides by its second sub-section that 'No limitations or conditions shall be included in any such license which would limit the rights of a corporation coming within class 7 or class 8' (in which class the companies whose rights are in question are included), 'to carry on in Ontario all such parts of its business and to exercise in Ontario all such parts of its powers as by its Act or charter of incorporation it may be authorized to carry on and exercise therein.'". May I just say in a word that that distinguishes the Ontario Acts from the Manitoba Acts. That is the only point of distinction.

VISCOUNT HALDANE: This saving clause? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: If read literally, it would go the whole way. MR. WEGENAST: Yes, it would, my Lord, if it could be read literally.

VISCOUNT HALDANE: It is very difficult to know what it means if the preceding sections apply. MR. WEGENAST: Yes, that is so, my Lord.

VISCOUNT HALDANE: Except that they are not to apply to cases within 7 and 8. MR. WEGENAST: Yes, my Lord. The Manitoba Act asserts the right to limit the powers of the company in the license itself. The Ontario Act does not.

VISCOUNT HALDANE: That may be so. MR. WEGENAST: That I think is the only distinction, except the incidental distinction that the land-holding question is in Ontario dealt with in a separate Act.

LORD PARMOOR: It negatives in terms the right to include in a license any of these limitations. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: I think it is not confined merely to powers as distinguished from the liability to penalties. I think it goes to the whole thing. MR. WEGENAST: Yes, my Lord.

LORD PARMOOR: As far as the license is concerned. MR. WEGENAST: Yes. That is from and after the issue of the license, of course. Then at line 21: "Section 10, which authorizes the Lieutenant-Governor-in-Council to make regulations respecting '(*a*) The evidence required upon the application for a license as to the creation of the corporation, its powers and objects and its existence as a valid and subsisting corporation. (*b*) The appointment and continuance by the corporation of a person or company as its representative in Ontario on whom service of process, notices or other proceedings may be made, and the powers to be conferred on such representative.'" May I say there that the provision of the British Columbia Act in that behalf, to which your Lordship made extended reference in the argument in the John Deere Plow Company's case, were copied, I take it, verbatim from the regulations in Ontario. Your Lordship will remember that the company was obliged to appoint a resident attorney, with very extensive powers, including almost all the powers of the company.

VISCOUNT HALDANE: And these were transferred to the British Columbia Regulations. MR. WEGENAST: Yes, my Lord, and put in the Act itself. Here they are embodied in the Regulations made by Order-in-Council, and I have already referred to the Regulations in respect of name. Then at line 30: "'(*c*) The forms of licenses, powers of attorney, application, notices, statements, returns and other documents relating to applications and other proceedings under this Act,' and also authorizes the Lieutenant-Governor-in-Council to 'make orders as to particular cases where the general regulations may not be applicable or where they would cause unnecessary inconvenience and delay.' Section 11, which provides that an applicant for a license shall establish to the satisfaction of the Minister charged with the administration of the Act, or some person authorized by him to report thereon that the provisions of the Act and of the regulations have been complied with. Section 12, which authorizes a company licensed under the Act subject to the limitations and conditions of the license and of its own charter, Act of incorporation or other instrument creating it to acquire, hold, mortgage, alienate and otherwise dispose of land in Ontario to the same extent and for the same purposes as if it had been incorporated under the Ontario Companies Act with power to carry on the business and exercise the powers embraced in the license. Section 14, by which annual returns are required to be made to the Minister, containing a statement under oath and according to a form approved of by the Lieutenant-Governor-in-Council containing information similar to that required by section 135 of the Ontario Companies Act"—that we say at once casts a gloss over the Act.

MR. WALLACE NESBITT: Why?

MR. WEGENAST: The information required is the kind of information which is required in connection with the administration of the local Companies Act. It is a company law.

MR. WALLACE NESBITT: Do you mind showing their Lordships what that information is?

MR. WEGENAST: Not just now.

VISCOUNT HALDANE: Perhaps we may adjourn at this point. MR. WALLACE NESBITT: May I say to your Lordships that I have now looked that up. The change that we have been assuming was within this, was not made until 1918.

VISCOUNT HALDANE: So that as quoted in the judgment the law is stated accurately. MR. WALLACE NESBITT: Yes, my Lord, but I had nothing but this before me.

VISCOUNT HALDANE: Then we may take the judgment as accurate? MR. WALLACE NESBITT: I think so, my Lord.

(Adjourned for a short time.)

MR. WEGENAST: Then the learned Judge goes on at page 24, line 13: "Section 16, which provides a penalty for carrying on any part of its business in Ontario contrary to the provisions of section 7, and that so long as a company is unlicensed it shall not be capable of maintaining any action or proceeding in any Court of Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of

section 7. Sections 17 and 18, which authorize the remission of penalties, and provides that no proceedings for the recovery of them shall be taken without the consent of the Attorney-General or after six months from the time when they were incurred. Section 19, which provides that: 'There shall be paid to His Majesty for the public use of Ontario for every license under this Act, such fees as may be prescribed by the Lieutenant-Governor-in-Council.' Section 20, which provides for the fees to be paid upon transmitting the statement required by section 14. Certain extra-provincial corporations are not required to be licensed (section 33), and section 2 (*a*). Extra-provincial corporation is declared to mean a corporation created otherwise than by or under the authority of an Act of the Legislature of Ontario, and sections 7, 9 and 16 are made applicable to 'corporations not coming within any of the classes 1 to 8,' and therefore to foreign corporations. The first Extra-Provincial Corporations Act was 63 Victoria, chapter 24, which was substantially the same as R. S. O., chapter 179, except that it did not include sub-section 2 of section 9 of the Revised Statute, which was first enacted by 1 Edward VII, c. 19, s. 3 or s. 19 which was first enacted by 3 Edward VII. c. 7, s. 53—that section amended section 18 of the first Act by which the amount of the fees was prescribed. By the schedule of fees now in force, prescribed by the Lieutenant-Governor-in-Council on the 2nd December, 1909, the fees for licenses to 'Dominion corporations are $25.00, if the Company's capital is $100,000.00 or less and $50.00 if it exceeds $100,000.00, and the fee for a license in Mortmain is $100.00.'" (that is quite incorrect). The schedule of fees is fixed by Order-in-Council two years later, in 1911. That was apparently what my learned friend had in mind. It is a franchise, a fee, a royalty, and is exactly the same fee as if paid by local companies), "and the fees in the case of other extra-provincial corporations are stated to depend largely on the amount of capital used in Ontario calculated on the table of fees for the incorporation of domestic companies, I have referred to all the important provisions of the Extra-Provincial Corporations Act, not because the validity of all of them is directly in question, but in order that they may be looked at for the purpose of determining what is the true nature and character of the Act. The view of my brother Masten was that it had been settled by the case of *John Deere Plow Company* v. *Wharton* (1915), A. C. 330, that 'the power to regulate trade and commerce at all events entitled the Parliament of Canada to prescribe to what extent the powers of companies, the objects of which extend to the entire Dominion should be exercisable.' Then section 7, sub-sections 1 and 2 and the definition of class 8—corporations created by or under the authority of an Act of the Dominion of Canada, and authorized to carry on business in Ontario—'gives the joy note of the Act; its pith and substance and its purpose as applied' to the defendant company and to deprive it of its status in the Province of Ontario unless and until it files certain documents, pays certain fees and takes out a license.' If this be a correct view as to what the 'pith and substance' of the Act is, I would agree with my learned brother, but is it the correct view? That notwithstanding that the Dominion has conferred on a company of its creation rights and powers, the company is subject to and bound to obey the laws of the province with regard to taxation for provincial purposes, as to its contracts made within the province, and as to the holding of tenure of land, is equally well settled, and the exercise by the province of its authority to pass such laws necessarily limits or restricts the powers granted to it by the Dominion."

VISCOUNT HALDANE: The awkward thing on that argument is section 66. If such a company is unlicensed it cannot maintain an action. MR. WEGENAST: He afterwards holds that the section is invalid.

VISCOUNT HALDANE: You do not say that is valid, do you, Mr. Nesbitt? MR. WALLACE NESBITT: It is not worth contesting, because the legislation has been amended so that it is merely academic, but I should contest it otherwise. As I say, it is not of any real importance.

MR. WEGENAST: It has not been amended in the Manitoba one, has it?

MR. WALLACE NESBITT: Yes, it has been in the Manitoba case.

MR. WEGENAST: It has been sustained by the Supreme Court in that case.

MR. WALLACE NESBITT: It has not been maintained there.

MR. WEGENAST: No. I shall deal later on with the question of the character and scope of laws which such a company is subject to and is bound to obey. The question in the John Deere Plow Company case was as to the validity of Part VI. of the Companies Act, and what was decided was that: 1. The power of legislation with reference to the incorporation of companies with other provincial objects belongs exclusively to the Parliament of Canada. 2. The matter is not one 'coming within the classes of objects assigned exclusively to the Legislatures of the provinces,' within the meaning of the initial words of section 91, but is to be regarded as a matter affecting the Dominion generally and covered by the expression 'the peace, order and good government of Canada.' 3. Head 2 of section 91, which confers exclusive powers on the Dominion Parliament to make laws respecting trade enables that parliament to prescribe to what extent the powers of companies, the objects of which extend to the entire Dominion, shall be exercisable, and what limitations are to be placed on those powers 4. That sections 5, 10, 12, 29 and 32 of the Companies Act (Canada), and section 30 of the Interpretation Act (Canada), are *intra vires* the Parliament of Canada. 5. That inasmuch as the provisions of the British Columbia Act which were in question would compel the appellant company to obtain a provincial license of the kind about which the controversy had arisen or to be registered in the province as a condition of exercising its powers or of suing in its Courts, they were inoperative for those purposes. Rules for the interpretation of sections 91 and 92 were laid down, and qualifications of the general statements upon which the conclusions Numbered 1 to 5 were based, were made as follows: 1. That the expression as to 'civil rights' notwithstanding the generality of the words must be regarded as excluding cases expressly dealt with in section 91 or section 92. That even when a company has been incorporated by the Dominion Government with powers to trade it is not the less subject to provincial laws of general application enacted under the powers conferred by section 92, that notwithstanding that a Dominion company has capacity to hold land it cannot refuse to obey the Statutes of the province as to Mortmain or escape the payment of taxes even though these may assume the form of requiring as the method of raising a revenue, a license to trade which affects a company in common with other companies, and that such a company is subject to the powers of the province relating to property and civil rights under section 92, for the regulation of contracts generally. 3. That it might be competent for a Provincial Legislature to pass laws applying to companies without distinction and requiring those that were not incorporated within the province to register for certain limited purposes such as the furnishing of information, and that it might also be competent to enact that any company which had not an office and assets within the province should, under a Statute of general application regulating procedure, give security for costs. It is to be noticed that all that was decided was that it was not competent for the Legislature to enact the provisions of the British Columbia Act, which were in question 'in the present form,' and that the key to the decision is what is stated on page 343, viz.: that in the opinion of the Judicial Committee those provisions were not of the character mentioned in the above paragraph 3, but were—'directed to interfering with the status of Dominion companies and to preventing them from exercising the powers conferred on them by the Parliament of Canada dealing with a matter which was not entrusted under section 92 to the Provincial Legislature.' What was meant by the expression 'provincial laws of general application,' as applied to the exercise by a Provincial Legislature, was probably such Legislature as was in question in the *Bank of Toronto* v. *Lambe*, which imposed the taxation on every bank carrying on the business of banking in the province, every insurance company accepting risks and transacting the business of insurance in the province, every incorporated company carrying on any labour, trade or business in the province, every incorporated loan company making loans in the province, every incorporated navigation company running a regular line of steamers, steamboats or other vessels in the waters of the province, every telegraph company working a telegraph line or a part of a telegraph line in the province, every telephone company working a telephone line in the province and railway companies and tramway companies working a railway or part of a railway or a tramway in the province, as applied to contracts such as legislation as was in question in *Citizens* v. *Parsons*,

which provided that certain conditions should be deemed as against the insurer to be paid of every policy of fire insurance thereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein, subject to a limited right given to the insurer to vary these conditions and as applied to holding land that a Dominion is only enabled to acquire, and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land:*Colonial Building and Investment Association* v. *Attorney-General of Quebec.* What I understand was meant by Viscount Haldane, by whom the judgment of the Judicial Committee in the John Deere Plow Company case was delivered, by the expression 'provincial laws of general application,' was such laws as I have just mentioned, and that the view of the Judicial Committee was that it was not competent for a Provincial Legislature to single out Dominion corporations and subject them to laws which were not applicable to all corporations." What we say is, it is just as bad, if not worse, to place Dominion Corporations in the category of a foreign corporation. That makes the offence worse. It is the differentiation between the Dominion company and the local company.

VISCOUNT HALDANE: You say that is evidence of an intention to interfere with their status. MR. WEGENAST: Yes. It disturbs the generality of the Act. "I do not think that it was intended by the observation made as to the powers which might be exercised by a Provincial Legislature in respect of Dominion corporations to give an exhaustive definition of those powers; what was intended was, I think, to give illustrations for the purpose of indicating the kind of powers that Viscount Haldane had in view as being properely exercisable by a Provincial Legislature, and indeed it was expressly stated by Viscount Haldane (page 343), that the Committee did not attempt to define a *priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by provincial laws of general application enacted under the powers conferred by section 92. In order to ascertain the scope and effect of the decision in the John Deere Plow Company case, it is necessary to see what the facts and circumstances of it were. The material facts and circumstances were that the effect of Part VI. of the Provincial Act was *inter alia* to require that every company incorporated otherwise than under the laws of the province should be licensed or registered under the provincial law and that until it should be so licensed or registered it should not be capable of carrying on business in the province or of maintaining proceedings in the provincial Courts in respect of any contract made within the province; that the company had applied for a license, but its application was refused by the Registrar on the ground that there was another company of the same name upon the register, in which case section 18 of the Act as amended by section 6 of chapter 3 of the Acts of 1912 prohibited the granting of a license. It is important to observe that the opinion of the Judicial Committee that this legislation was *ultra vires* is confined to declaring that: 'It was not in the power of the Provincial Legislature to enact these provisions in their present form' (the italics are mine), page 343. It is important also to observe that the British Columbia Act assumed to deny the right to a license if the name of the company applying for it was that of another company upon the register, and that the controversy between the company and the British Columbia authorities began with the refusal of the Registrar to issue a license for which it was applying, unless a change were made in the company's corporate name—undoubtedly an interference with the status of the company." The position we took was that we did not need the license: "There was much discussion upon the argument before us as to whether the presence of this provision was not what led the Judicial Committee to its conclusion that the provisions of the Act in their present form were *ultra vires.* Some support for an affirmative answer to that question may be found in what was said by Viscount Haldane at page 341. He there speaks of the provisions of the British Columbia Act: 'Relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy had arisen.' Reading this language in connection with what I have said as to how the controversy begun, and with the form in which the opinion of the Judicial Committee as to the invalidity of the Legislature was expressed, there is at least some ground for thinking that the question I have mentioned should be answered in the affirmative. Attention

should also be directed to the important difference as to this matter between the Ontario Act and the British Columbia Act. By the former not only is such a condition as that imposed by the latter to the issue of a license not imposed, but it is expressly provided that: 'No limitations or conditions shall be included in any such license which would limit the rights of a corporation coming within class 7 or class 8, to carry on in Ontario all such parts of its business and to exercise in Ontario all such parts of its powers as by its Act or charter of incorporation it may be authorized to carry on and exercise therein.'"

VISCOUNT HALDANE: I have great difficulty in reconciling that with section 16. MR. WEGENAST: Yes, or for that matter with section 17. There would be a period during which the company would be prohibited. What I had a reference to was that there would necessarily be a period before the issue of the license, and that would be limited to I think within what Lord Haldane said. It is too wide when the license is issued to say there has not been a limitation. That is what I thought his Lordship meant: "I venture to doubt whether if the British Columbia Act had contained such a provision as this, and there had been absent from it the provision as to withholding the license if there was on the register a company having the same name as the company applying, the conclusion would have been reached that the Act was in substance and in effect an Act affecting the status of Dominion companies and restricting them from exercising in the province the right which as it was held, had been conferred on them by the Parliament of Canada. Just as the wide and comprehensive expression 'property and civil rights' may, and in some cases must, be cut down, so the wide and comprehensive expression 'the regulation of trade and commerce,' is not to be interpreted in a literal sense. That was pointed out in *Montreal* v. *Montreal Street Railway Company* (1912), as it had before been pointed out in *Bank of Toronto* v. *Lambe,* and it was recognized in the John Deere Plow case, at page 340. A different rule apparently applies where a subject such as 'banking' is among those enumerated in section 91, for, as was held in *Tennant* v. *Union Bank of Canada* (1894), the exclusive authority conferred on the Parliament of Canada by section 91 (15), to make laws as to banking and the incorporation of banks was not confined to the mere constitution of corporate banks with the privilege of carrying on the business of bankers, but was extended to other matters, and comprehended banking, which was wide enough to embrace every transaction coming within the legitimate business of a banker, and that the lending of money on the security of goods or documents representing the property of goods was a proper banking transaction, and it was accordingly also held that a section of the Bank Act, 46 Vict. c. 120, which authorized banks to acquire and hold warehouse receipts or bills of lading." His Lordship loses sight of the expression to which I referred your Lordship this morning in the insurance reference: "The decision in the John Deere Plow Company case was based upon the proposition that the authority of the Parliament of Canada to make laws as to the incorporation of companies other than those objects were provincial, and to confer upon companies created under the authority of those laws, the powers which the Companies Act of Canada and section 30 of the Interpretation Act conferred upon them was derived from the authority of Parliament to pass laws for the peace, order and good government of Canada and laws for the regulation of trade. It follows from this that unless the provisions of the Ontario Act in question lie outside this domain of the Parliament of Canada or come within the classes of cases in which, according to the John Deere Plow Company case, Provincial Legislatures may legislate with regard to Dominion companies, it must be held that it was not competent for the Legislature of Ontario to enact those provisions. Before entering upon the enquiry necessary to determine these questions I desire to say that in my opinion it is not competent for this Court or for any Court to inquire as to the good faith of a Provincial Legislature in enacting its laws or to find that it has acted in bad faith. It is not a matter of good or bad faith surely, although in the Supreme Court of Canada the words "an honest endeavour" are used. One can assume that both the provinces and the Dominion have the right to exploit their jurisdiction to the full without any imputation on their honesty or otherwise. It does not affect the question.

MR. WALLACE NESBITT: His Lordship means you have been imputing the motive to the local Legislature of trying to destroy the Dominion companies in favour of their own.

MR. WEGENAST: It is possible to look at the Act to see if there is an ulterior motive.

VISCOUNT HALDANE: You have to look at what they have done, and see whether it comes within the power which the Act of 1867 attributes to them? MR. WEGENAST: Yes, and in doing that, one must consider the pith and substance of the Act. The learned Judge goes on at line 37: "Within the limits of its constitutional authority the Legislature of a province is a Sovereign Legislature, having within those limits the like power and authority as that possessed by the Imperial Parliament. The duty of a Court called upon to determine questions as to the constitutionality of an enactment of a Provincial Legislature is to determine whether upon the true construction of the enactment it is one which under the British North America Act, it was competent for the Legislature to pass, and beyond that the Court cannot go."

VISCOUNT HALDANE: That is quite right. MR. WEGENAST: That is quite correct, of course. "I do not mean to suggest that in such a case as the one now under consideration the Court may not look beyond the form in which the enactment is expressed, and if from the nature of its provisions it is found not to be what it assumes to be in its 'pith and substance,' something different, and so different that it encroaches upon the domain of legislation assigned exclusively to the Parliament of Canada, it is not the duty of the Court to pronounce against its validity," all of which I support fully. "I adopt what was said by the late Chief Justice of Canada (Strong) in *Severn* v. *The Queen,* as to the general principle to be applied in determining questions as to the validity of provincial enactments. That principle was stated by him: 'It is, I consider, our duty to make every possible presumption in favour of such legislative Acts, and to discover a construction of the British North America Act, which will enable us to attribute an impeached Statute to a due exercise of constitutional authority before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it; and in doing this we are to bear in mind that it does not belong to the Courts of Justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it.' I desire also to express my entire concurrence with what was said by Mr. Justice Duff in the Companies case, as to the impossibility of holding that a Court has power to effect the nullification of a Provincial Statute, because of the motives with which the legislation was enacted; supported, as his statement is, by what was said by Lord Hobhouse in *Bank of Toronto* v. *Lambe,* and by what was said by the Committee in previous and subsequent cases. I come now to the question as to what is the 'pith and substance' of the Act the validity of which is impugned. Is it what on its face it purports to be, or does it impose upon Dominion companies restrictions which the Legislature could not lawfully impose. The constitutional right, in order to the raising of a revenue for provincial purposes, to impose direct taxation upon Dominion companies doing business in the province, is unquestionable, and was not questioned at the Bar. That it has the like right in the exercise of the powers conferred by section 92 (9), to require, in order to the raising of a revenue for provincial purposes, such companies to be licensed is also, I think, not open to serious question in view of the decision of the Judicial Committee in *The Brewers and Maltsters Association* v. *Attorney-General for Ontario,* and of what was said by Viscount Haldane in the John Deere Plow Company case." There, of course, I diverge most decidedly from his Lordship's view. There is nothing in the Maltsters case to support a license on corporate capacity. "Having authority to require such a company to be licensed, a provincial company has also, in my opinion, the power to require that the license shall be obtained as a condition precedent to the exercise by such companies of the right to carry on their business in the province." That I think is established by the case of the Brewers and Malsters' company. Once you concede the power to license then the rest follows. That is where we diverge, and everything is comprehended in what I have submitted already, and this kind of license is not comprehended within item 9 of section 92.

The question in that case was as to the validity of a provincial enactment, the effect of which was to require the Brewers and Distillers and other persons duly licensed by the Government of Canada to manufacture fermented spirituous or other liquors, to first obtain a license to sell by wholesale under the Act, the liquor so manufactured by them when sold for consumption in the province. It was argued by the appellants, the Brewers and Maltsters Association of Ontario, that inasmuch as, as the fact was, the Parliament of Canada had always regulated by Statute the trade of manufacturing and wholesale vending of spirituous and fermented liquors; had laid considerable duties upon them, created a rigorous system of inspection, supervision, management and control of the business, and had provided for the issue of licenses to the manufacturers and vendors of these commodities, authorizing them on certain conditions to make and sell; the Dominion Parliament had occupied the whole field of legislation on the subject, and that it was an interference with the powers of the Dominion derived from its exclusive jurisdiction for the regulation of trade and commerce, the public debt and the raising of money by any mode of taxation, for the province to step in and add to the conditions already prescribed by enacting that a provincial license should also be necessary." That is a very fair and comprehensive statement of the argument in the Brewers case. This argument did not prevail, and the validity of the enactment was upheld as authorized under section 92 (2), or section 92 (9), or both of them. The Dominion Act then in force was the Inland Revenue Act, R. S. C., 1886, c. 34, and the licenses for which provision was made were 'licenses to carry on the trade or business'—the case was, therefore, one in which the Parliament of Canada had regulated the trade and prescribed the conditions in which it might be carried on throughout the Dominion." His Lordship, of course, fails to observe the distinction between regulation of trade and commerce generally, and the regulation of a particular trade, to which your Lordships referred in the Insurance case. The question whether the provisions of sections 10, 11, 12, 14, 15 are *ultra vires* is, if I am right thus far, a question of minor importance." I should, of course, differ from that. In section 15, which authorizes the revocation or suspension of a license 'default in complying with the limitations and conditions of the license,' is mentioned as one of the causes for which a license may be revoked or suspended. These words were appropriate enough as the Act originally stood, but since the amendment made by 1 Edward VII., section 3, which is now section 9 (2), already quoted, the words have no meaning, and would no doubt have been eliminated, but for an oversight of the draughtsman of the amendment." That is all very well, but to suggest that by submitting to a license under the Act we submitted to the possibility of having our powers cancelled—

VISCOUNT HALDANE: What the learned Judge means, and there is a good deal to be said for it, is that if there is a power to tax, then there is a power to take every step that is required to make the tax effective, that is to say you shall not carry on business unless you pay the tax. MR. WEGENAST: Of course, I must meet that. I should argue that the word " tax," after all, must be given the meaning in the ordinary acceptation of English. It does not imply outlawry, surely.

VISCOUNT HALDANE: May not it imply that you shall not carry on this business without paying a tax? MR. WEGENAST: I submit not. If that were so why was it necessary to have any provision for licensing? The licensing provision is very restricted.

VISCOUNT HALDANE: Licensing is then mere machinery. MR. WEGENAST: So long as it does not prohibit; so long as it is merely form as was stated in the Brewers case.

VISCOUNT HALDANE: So long as the remedy is *in personam* you say. MR. WEGENAST: I have not fully considered the bearing of that.

VISCOUNT HALDANE: The remedy *in personam* either by suing or by Police Court proceedings or something of that kind not precluding the carrying on of the business, but a penalty. MR. WEGENAST: In that sense I accede to that. I do say, however, by way of qualification that were the penalty *in personam* invades the capacity or status of a company.

VISCOUNT HALDANE: You must remember that in the Mortmain case it is common ground that the province may say you shall not take land as a corpora-

tion, except under certain restrictions. The Dominion say you shall hold land, and the province say no, you shall not hold more than a certain amount. MR. WEGENAST: The province say to its own company: You can hold land as an incident to the carrying on of your business and a Dominion company cannot.

VISCOUNT HALDANE: It says no company is to carry on business without a license. MR. WEGENAST: Except a provincial company.

VISCOUNT HALDANE: They are licensed. They have to submit to registration under the Act. MR. WEGENAST: They get their right to hold land thrown in as an incident of their incorporation. The province places itself in a position to bargain, to make a deal as it were with their local corporation, and it gives the Dominion company a handicap. The Dominion company do not start off on the same basis. The provincial company has it in its power to hold land as an incident of its incorporation; the Dominion company has not; it is not recognized.

VISCOUNT HALDANE: It is already in existence. It has its powers, and it has to get something extra to put it on the same footing as the other company. MR. WEGENAST: If the province enacting legislation applying to all companies alike as your Lordship put it in the John Deere Plow case, regulating the land-holding, and directed to the prevention of abuse in the holding of land by a corporation. But where you see power to hold land used as a means of bargaining, or giving a provincial company a special advantage over the Dominion company by way of inducing incorporators to come to the province for their charter. The fee for a license to hold land is exactly the same as the fee for incorporation. The whole thing works together, and what I desire to submit is that the Statutes relating to holding land are not Mortmain Statutes, they are part of a legislative scheme to deter incorporators from going to the Dominion for their charter. In Canada every lawyer recognizes that that is the real object.

MR. WALLACE NESBITT: I am one lawyer and I never heard it asserted except by my friend, and it is utterly denied by the Provincial Secretary and the Prime Minister.

MR. WEGENAST: If it is necessary I join issue on that point.

VISCOUNT HALDANE: We cannot let you go into that. I think you had better go on with the judgment now. MR. WALLACE NESBITT: It is perfectly absurd.

MR. WEGENAST: It is a question whether the Dominion shall continue to incorporate companies with any real powers, because if a group of incorporators find themselves in a position that they get by a Dominion charter is simply the right to go to the province for another charter to eke out their rights, they might as well go to the province in the first instance. The judgment goes on at line 38: "The provisions of these five sections appear to me to come within the class of provision which in the John Deere Plow Company case it was held that it was competent to a Provincial Legislature to enact, and I cannot see that they are unreasonable or that they impose an unnecessary burden on the companies to which they apply. That part of the section 16, which relates to the penalty is, if I am right in my conclusions as to the extent of the powers of provincial legislation, undoubtedly *intra vires,* as the power of imposing penalties is conferred by section 92 (15). In its present form the latter part is objectionable, and, I think, *ultra vires.* It is also unnecessary if a Dominion company may not carry on its business in the province unless licensed, because a contract entered into by it when unlicensed would not be enforceable. I have thus dealt with the case on the assumption that the provisions of the enactment in question are 'provincial laws of general application' within the meaning of that expression as used in the John Deere Plow Company case, and the question whether there are such laws remains to be considered. The provisions of the Ontario Companies Act must, I think, be taken into consideration for the purpose of ascertaining whether Dominion companies are singled out for taxation to which provincial companies are not subjected, and whether the requirements of sections 10, 11, 12, 14 and 15 are imposed upon Dominion companies and not on provincial companies. The question is not, I think, whether the enactment in question standing by itself is open to objection for these reasons, but whether the company law of the province viewed as a whole is so open. Nor is it in my opinion essential that the form in which the taxation is imposed should be identical in all cases. The important question

is, does the provincial legislation discriminate in that respect against Dominion corporations? In my view, that question must be answered in the negative. The tax imposed in the case of Dominion companies is imposed in the form of a license fee, the maximum fee being $50.00 and the minimum $25.00. His Lordship is entirely wrong.

MR. WALLACE NESBITT: Why do you say that?

MR. WEGENAST: My friend challenges that. Will your Lordships look at page 22 of the document marked M.

VISCOUNT HALDANE: What is this for. Why are you interrupting the reading of the judgment? MR. WEGENAST: To answer my friend, Mr. Nesbitt's challenge, as to the correctness of my statement.

VISCOUNT HALDANE: Let us look at the words and see if we cannot correct it. It says the maximum fee is 50 dollars and the minimum 25 dollars. You say that that was the result of an alteration made subsequently. MR. WEGENAST: No, that is not the case. Those are not fees paid by Dominion companies. Dominion companies pay under regulation just exactly the same fee as if they had been incorporated under a provincial charter, that is a fee based on the authorized capital of the company, but as your Lordship will notice on page 24 of the document marked M———

VISCOUNT HALDANE: I am most reluctant to interrupt the reading of the judgment. What is the point of this? MR. WEGENAST: The point is that his Lordship is incorrect in saying that the fees are 50 dollars and 25 dollars respectively.

VISCOUNT HALDANE: What does it matter. What do you say they are? MR. WEGENAST: I say they are royalties for a charter, just as is given for every provincial charter, and it is part of the scheme of making these Dominion companies become incorporated over again under the provincial charter. The fees are highly significant.

VISCOUNT HALDANE: Will you give the reference to the sections and we will look at them afterwards. MR. WEGENAST: It is on page 24 of M.

VISCOUNT HALDANE: What section is it? MR. WEGENAST: It is an Order-in-Council.

MR. WALLACE NESBITT: Will your Lordships read all that page 22. It says, except in the case of Dominion corporations shall pay 25 and 50 dollars.

MR. WEGENAST: That was abrogated. The Order-in-Council, page 24, abrogates the previous order.

MR. WALLACE: It does not say so.

LORD PARMOOR: At page 24 it says there shall be a differentiation between the two. MR. WEGENAST: Yes, that is my complaint.

VISCOUNT HALDANE: Will you go on reading the judgment. MR. WEGENAST: Yes. "In the case of provincially incorporated companies the tax is imposed in the form of a fee for the grant of the letters patent which confer the right to carry on the company's business." My point is that the fee in the case of the Dominion company is the same kind of fee, and that it bears out the general plan of this Act, and that it requires the company to accept a legal sanction or franchise— "and the fees vary according to the amount of the capital stock of the company, from a minimum fee of $100 to a maximum fee, where the capital exceeds $100,000, of $385.00, with an additional $2.50 for every $10,000.00 or fractional part thereof in excess of $1,000,000.00. The result of this is that the tax imposed on Dominion companies is less than that imposed on provincially incorporated companies." That I say is not true. "It is quite true that a Dominion company had paid fees to the Dominion authority upon obtaining its charter, but that is not, I think, a factor to be taken into account in ascertaining whether the provincial tax bears more heavily on Dominion companies than on provincially incorporated companies. Provisions similar to those of section 14 are applied to companies incorporated under the Ontario Companies Act (sections 135, 137). The provisions of sections 10, 11, 12 and 15 may be supported, I think, as ancillary to the powers of taxation and licensing are proper for the purpose of making effective use of those powers. It is settled by decided cases that provincial legislation with reference to a subject

assigned exclusively to the Provincial Legislatures is not invalid because it may, or even must, interfere with matters as to which the Parliament of Canada has exclusive legislative authority, such as the raising of a revenue for Dominion purposes or with the carrying on of trades in the province licensed by the Dominion or indirectly with business operations beyond the province. *Attorney-General for Ontario* v. *Attorney-General for Canada* (1896), A. C. 348; *Attorney-General* v. *Manitoba License Holders Association* (1902), A. C. 73, 79, 80. Each of the powers which it was determined by the Judicial Committee in the John Deere Plow Company case, and in the cases referred to in that case, a Provincial Legislature may exercise in regard to companies with other than provincial objects created by Dominion authority, in a sense restricts the exercise by them of powers conferred upon them by that authority; the power to require them to be licensed does so, so also do the powers to subject them to provincial taxation to the laws of Mortmain and to the regulation of the form their contracts must take. All of these provincial powers are powers conferred either by section 92 (2), by section 92 (9), or by section 92 (13)." The provision is that so long as these provincial companies operate in their proper plane nobody can object. "Looking at the Act in question as a whole, in my opinion it is not in its 'pith and substance' an Act designed to restrict Dominion companies in the exercise of the powers conferred upon them by Dominion authority, but an Act lawfully passed for the purposes as to which the Legislature by which it was enacted had authority to legislate. I except, however, the last part of section 16 for the reasons which I have already mentioned. I would, for these reasons, allow the appeal on this branch of the case and substitute for the declaration and judgment of my brother Masten a declaration and judgment in accordance with the opinion I have expressed, and my answers to the questions of the special case are: 1st. Yes, except the last part of section 16, and to the second and third, yes. There remains to be considered the question whether the defendant company is incorporated or prohibited by reason of not being licensed as required by the Act in question, from holding the lands leased to it by Harris. It is as I have already pointed out, settled law that a Dominion company is subject to and bound to obey the Statutes of the province as to Mortmain, or as put by Sir Montague E. Smith, in *Colonial Building and Investment Association* v. *The Attorney-General of Quebec* (1883), 9 A. C. 157, 166, the capacity given to such a company by its incorporation only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. It was argued that this did not apply to a trading corporation, but there is in my opinion no foundation for that contention. It was said in *Citizens* v. *Parsons* (1881), 7 A. C. 96, 177: "Suppose the Dominion Parliament were to incorporate a company with power among other things to purchase and hold lands throughout Canada in Mortmain." It was argued that it would not be possible for the province to prevent a Dominion company entirely from holding such land as was necessary for its trading purposes. It must manifestly have an office, just as a bank. The province could not say no bank shall hold land in this province.

VISCOUNT HALDANE: I do not know. It seems to me rather a difficult contention to maintain. MR. WEGENAST: Take the case of a railway company, could the province say no railway company shall hold land in the province, it being necessary for a railway company that it should occupy land?

VISCOUNT HALDANE: Yes, supposing it had to take out a license in order to hold the land. MR. WEGENAST: I would have submitted not, and there has been no thought of making a railway company or bank take out a license in that way; such a thing has never occurred.

VISCOUNT HALDANE: I do not see why they should not as much as anybody else. MR. WEGENAST: Then what would be the penalty supposing that a license were not taken out?

VISCOUNT HALDANE: That is another question. MR. WEGENAST: Would not it be an interference with the powers exercisable under the enumerated item of section 91?

VISCOUNT HALDANE: No. Section 91 says you may incorporate a company, and give it power to trade. It does not say you may override the general laws of

the province. MR. WEGENAST: No, I do not say that. Taking the case of a railway company. The business of a railway company implies the holding of land. The question is whether the province could under its jurisdiction over land holding come in and say to a railway company you must take out a license before you can hold land.

VISCOUNT HALDANE: We have not to decide that in this case. MR. WEGENAST: Have your Lordships not to decide something lying right alongside of it? If this company has authority to trade, could the province prevent it from occupying premises under a lease? In this case it was a lease. We are dealing with the case of the law which admits that the local company can do these things.

VISCOUNT HALDANE: That is another thing. Suppose there was a general law which said no corporation is to hold more than one hundred acres of land, could you have a railway company in that province? MR. WEGENAST: If there was a provision framed that no railway company should hold land in fee, but left it open for them to hold it under some other tenure, I think I am on very solid ground there, because Sir Montague Smith applied that in his decision in the Colonial Building case.

VISCOUNT HALDANE: We shall come to that. Let us get on with the judgment. MR. WEGENAST: "It could scarcely be contended if such a company were to carry on business in a province where a law against holding land in Mortmain prevailed (each province have exclusive power over property and civil rights in the province), and if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it by reason of all the provinces having passed Mortmain Acts though the corporation would still exist and preserve its status as a corporate body." There is nothing in this to suggest any such distinction as is contended for: what was said is applied to corporations whose powers include that of purchasing and holding land as well as to those where that is the sole power possessed by them. In the Deere Plow Company case the Judicial Committee was dealing with the case of a trading company, and if it had been thought that any such distinction existed that would have been said, but it was not. If a company incorporated for the sole purpose of purchasing and holding land throughout the Dominion is so subject to the mortmain laws of the provinces that it could do no business in any part of it by reason of all the provinces having passed Mortmain Acts, *a fortiori* where the purchase and holding of land is only incidental to the purposes for which the company is incorporated, its right to purchase and hold land in any province is subject to the laws of Mortmain in that province. See also *Chaudiere Gold Mining Company of Boston* v. *Desbarats* (1873), 5 P. C. 277, in which it was urged that the Quebec Laws of Mortmain were not applicable to trading companies because their lands were not withdrawn from commerce and were alienable, and it was answered by the Judicial Committee (9. 296), that: 'The withdrawal of lands from commerce was only one and not the main reason of the law of Mortmain.' The Mortmain Act of this province is R. S. O., c. 103, and by its third section it is provided that: 'Land shall not be assured to or for the benefit of or acquired by or on behalf of any corporation in Mortmain otherwise than under the authority of a license from His Majesty the King or of a Statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be forfeited to His Majesty from the date of the assurance, and His Majesty may enter on and hold the land accordingly'; and by section 4 the Lieutenant-Governor-in-Council is authorized to 'grant to any person or corporation a license to assure land in Mortmain in perpetuity or otherwise.' It was urged that the defendant company having been empowered by a Statute of the Parliament of Canada to acquire and hold land, the land assured to it by Harris was so assured under the authority 'of a Statute for the time being in force' within the meaning of section 3. The words 'of a Statute for the time being in force,' in my opinion apply only to a Statute of the province, and the words 'His Majesty' where they first occur in section 3, mean His Majesty acting by the Lieutenant-Governor of the province, and where they occur, the second time mean His Majesty in right of the province. To give to the words 'of a Statute for the time being in force,' any other meaning than I would give to them would be to interpret them as surrendering to the Parliament of Canada the provincial

authority to license in Mortmain, which by the 4th section is conferred upon the Lieutenant-Governor-in-Council in all cases in which Parliament should deem it proper to confer upon a corporation of its creation the right to acquire and hold lands in the province, and that that was what was intended is highly improbable. Unless there is something in the context to the contrary in my opinion where in a provincial Statute such a reference is made to a Statute as is made in section 3, 'Statute' means a Statute of the Legislature, which is speaking. It was also contended that the Mortmain Act is not a law of general application: because, as was contended a corporation created by the authority of the Legislature of Ontario may acquire and hold land without the license of the Crown. That, I think, is a misconception. A corporation which is authorized by a provincial enactment to acquire and hold land, has by the Act or charter which confers that authority the license of the Crown, and if the Act or charter does not confer that authority, the corporation cannot acquire or hold land unless licensed to do so in the mode provided by the Mortmain Act. The Act appears to me, therefore, to be clearly an Act of general application. I would, therefore, affirm the judgment of my brother Masten on this branch of the case and dismiss the appeal from it with costs. Before parting with the case it is not, I think, unfitting that I should make some general observations as to the question of the incorporation of companies and as to the way in which in my judgment the consideration of questions as to the extent of the legislative authority of the Parliament of Canada and the Legislatures of the province should be approached. It is, I think, to be regretted that at the outset it was not determined that the authority of the Parliament of Canada to incorporate companies was limited to creating them and endowing them with capacity to exercise such powers as it might be deemed proper that they should possess, but leaving to each province the power of determining how far, if at all, those powers should be exercised within its limits." Starting from that standpoint, of course, very much is possible that we say is impossible. This, of course, his Lordship takes from the Citizens Insurance case, which was afterwards qualified: "Such a construction of the British North America Act would have accorded with the basis and principle upon which the union of the provinces was founded, to which I shall afterwards refer, and would, at least, have had the merit of preventing such questions as arose in the Insurance case, the Companies cases and the John Deere Plow Company case from arising, and if it had been adopted the exact boundary line between Dominion and provincial powers with respect to the incorporation of companies would not have been, as it now is, undefined and uncertain." That is to say the Dominion Company have had nothing by its incorporation, except its legal entity: "The language used by Sir Montague E. Smith in *Colonial Building and Investment Association* v. *Attorney-General* (*supra*), page 166, appears to me to indicate that the view I have suggested as the proper one was his view, for he said: 'What the Act of incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business which are defined within a definite area, viz., throughout the Dominion.' But for the decision in the John Deere Plow Company case, I should have thought that such a Constitution might well have been adopted. I do not see why it might not well have been held that the expression 'incorporation of companies' in section 92 (11), extended only to the creation of the corporate body and endowing it with the capacity it was to have leaving the powers it was to exercise to be given to it under the authority conferred by one or other of the heads enumerated in the section, *e.g.* the wide fields of property and civil rights, the administration of justice and matters of a merely local or private character. Such a construction would, of course, have left to the Parliament of Canada authority to legislate for the incorporation of companies with other than provincial objects using the words 'incorporation of companies' in the sense in which I have just mentioned, but leaving to the province to endow the company with such powers as it should deem proper that it should possess. It is of the gravest importance to the people of Canada that the British North America Act, which was but the putting into legislative form of the agreement that had been come to between the provinces which had agreed to unite as one Dominion, as to the terms of their union, should be interpreted in accordance with the principle upon which that union was formed. The union was brought about after violent political

controversies between the political parties of the then Province of Canada had gone so far as to render the formation and maintenance of a stable government practically impossible. These controversies had their origin in what was thought by one party to be the unwarrantable interference by the Legislature of Canada through the representatives in it of one province with the domestic and local affairs of the other, and the impossibility owing to the same cause of effecting changes in the domestic laws, which the representatives of one province desired should be made. The existence of that state of matters resulted finally in the leaders of the two political parties contriving to bring about such a change in the Constitution of the country as would remove these and other anomalies and leave each province to manage its domestic affairs as it might deem best."

VISCOUNT HALDANE: Section 92 says companies with provincial objects are among the purposes for which legislation may take place. Here is a company which has not got a provincial object, but a general object. Where is the jurisdiction of the Provincial Parliament to endow such companies with powers? He is assuming that the Act might have been construed as meaning that all the Dominion did was to incorporate and endow with powers in the case of a company with general objects, but section 92 does not in terms that are expressed refer to such companies or empower the alteration of their status. MR. WEGENAST: Yes, but my argument is this gives the Dominion company something more than a disembodied spirit.

LORD PARMOOR: If a company is going to carry on business outside the particular province it must be incorporated by the Dominion, must it not?

VISCOUNT HALDANE: If it is a company with general powers, it is not enough to incorporate it. There is no direct capacity under section 92 in the provincial Parliament to deal with such a company at all.

LORD PARMOOR: Section 92 only deals with corporations within the province, and a company incorporated outside could only be incorporated by the Dominion power. Then as regards exercising the power in a particular province, his view is that that is a matter for the province. I do not say whether it is right or not. That is what I understand his view to be.

VISCOUNT HALDANE: There you get up against another difficulty. The regulation of trade and commerce has been held to apply to what is not a provincial purpose, but extends over the whole of Canada. Under that they carried a Temperance Act which extended to the whole of Canada, and which undoubtedly did authorize a very great exercise of rights within the province. If that should be repealed could you get out of it? MR. WEGENAST: It is like the Acts dealing with the sale of grain.

VISCOUNT HALDANE: Banking. MR. WEGENAST: This is an enumerated thing.

VISCOUNT HALDANE: Yes, but it has been extended to all sorts of things. A great deal is done by the Central Government. MR. WEGENAST: Yes, and necessarily so. How could any one province or group of provinces give that control. It is inter-provincial trading.

VISCOUNT HALDANE: How can the inter-provincial power be given without interfering with the exclusive jurisdiction of the province. MR. WEGENAST: It is essential that the Central Government should have the power, and it is necessary to the power of controlling trading companies incorporated by the Dominion that the Dominion should be able to give to its companies something in the nature of a franchise.

VISCOUNT HALDANE: That is the argument in the John Deere Plow case; the point was not overlooked. MR. WEGENAST: If I may just address myself to the remark of Lord Parmoor, the provincial company is quite capable of having a status outside the province with the permission of each province, and if there was not that difference, as your Lordship pointed out, in the insurance reference between the Dominion and the provincial company, that the one has something added to the abstract capacity, then a Dominion would be just like a provincial company, but the provincial company has no capacity of going into neighbouring provinces, the Dominion company has. The judgment goes on at page 36, line 11: "It is of the gravest importance to the people of Canada that the British North America Act, which was but the putting into legislative form

of the agreement that had been come to between the provinces which had agreed to unite as one Dominion, as to the terms of their union, should be interpreted in accordance with the principles upon which that union was formed." The union was brought about after violent political controversies.

VISCOUNT HALDANE: The Chief Justice is more fortunate than I in being able to form an opinion as to what they did agree in 1864. First of all the provinces, the most important of them did not agree to unite as one Dominion. On the contrary they agreed to abolish themselves. They handed themselves over to the Imperial Legislature to emerge in a new statutory form. Ontario is a very different thing to what it was in the days of the old Province of Canada and Quebec. MR. WEGENAST: The Dominion of Canada is divided into provinces, it is not made up of provinces.

VISCOUNT HALDANE: It is not a federal constitution like the Australian Commonwealth, as was pointed out in the Australian Commonwealth case. You have there a federal system. In Canada all the Constitution was put into the pot and regranted with new provinces. MR. WEGENAST: Yes.

VISCOUNT HALDANE: It is true about Ontario and Quebec. MR. WEGENAST: Yes.

VISCOUNT HALDANE: They are new creatures, they are not the old provinces at all. It was an Act of Parliament passed at their request that did the thing. MR. WALLACE NESBITT: I think all the Chief Justice means is that the Quebec Resolutions indicate that they agreed to, and what was put into effect.

VISCOUNT HALDANE: I was never able to gather anything from them excepting a general agreement as to the sort of terms on which the draftsmen was to work out a new Constitution. MR. WEGENAST: It was very carefully worked out.

VISCOUNT HALDANE: It was an agreement of all the people within the boundary of Canada as to what they would do. MR. WEGENAST: Then, my Lord, the judgment continues at line 8, page 36: "These controversies had their origin in what was thought by one party to be the unwarrantable interference by the Legislature of Canada through the representatives in it of one province with the domestic and local affairs of the other and the impossibility owing to the same cause of effecting changes in the domestic laws which the representatives of one province desired should be made. The existence of that state of matters resulted finally in the leaders of the two political parties contriving to bring about such a change in the Constitution of the country as would remove these and other anomalies and leave each province to manage its domestic affairs as it might deem best." One might very well add: and leaving the Dominion to manage affairs which were common to all of them. Then "Accordingly it was resolved that the legislative union between Upper Canada and Lower Canada should be dissolved and a new Dominion be brought into existence, comprising at the first as well as these two provinces, the Provinces of Nova Scotia and New Brunswick, and ultimately it was hoped, comprising all the British Dominions north of the United States of America, with a Constitution that would leave each province supreme in all domestic and local matters of a national character or importance—matters in which all the provinces had the same interest, although they might differ as to the means by which that interest should be best subserved. The British North America Act was the result, and it safely may be asserted that its basic principle was intended to be that each province should be autonomous and master of its own house." Yes, quite so: "This principle, I venture to think, has not always been applied to the determination of questions that have arisen under the Act, partly perhaps because it has been thought that having regard to the language used in the Act with regard to the question under consideration it could not be applied . . . and sometimes because the principle was not kept clearly in view. I have little doubt that if the authors of the compact which led to the union of the provinces had anticipated that such results would follow, as have in some cases followed from their work, they would have taken care to express what they meant in such language as would have rendered it impossible that the conclusions which were reached would have been come to." One may add there that the agreement might not have been reached at all if they had been absolutely unequivocal in their language.

Then comes the judgment of Mr. Justice Hodgins: "I agree with the judgment of my Lord the Chief Justice, but on one point I am not sure that I can go as far as he does. Clause 2 of section 9, R. S. O., c. 179, provides that no limitations or conditions shall be included in the license which would limit the exercise of the corporate rights authorized by the charter. But this sub-section deals only with the effect of the license when granted, and the restrictions which it contains. Section 7 of the same Act makes the obtaining of a license a condition which must be fulfilled before a corporation can carry on its business in Ontario, while sections 5 to 11 confine the right to such license to those corporations which comply with the Act and regulations. It does not seem to me that the sub-section at all meets the difficulty that if compliance with certain regulations, unwarranted, by law is a condition precedent, then the operations of a corporation will be effectually blocked, notwithstanding that the license, when obtained, will be found to be free from any stipulation continuing the obnoxious provision." That is the point your Lordship means.

VISCOUNT HALDANE: Yes. MR. WEGENAST: Then: "The Lieutenant-Governor-in-Council, under section 10, has power to make regulations respecting certain matters, none of which, either in themselves or as enacted in Exhibit 3, appear to go beyond what was the Deere case indicated as a proper use of the provincial powers. I do not think that an Act is open to objection from a constitutional point of view, because the powers conferred by it are wide enough to enable acts to be done which may be *ultra vires* of the enacting authority—your Lordship notices he passes away from that point without applying it. He has made the point and does not dissent apparently. Then "I do not think an Act is open to objection from a Constitutional point of view, because the powers conferred by it are wide enough to enable acts to be done which may be *ultra vires* of the enacting authority—such powers will always be read as intended to be used in a legitimate way, and it is only when the Act which it is contemplated will be done is in itself *ultra vires*, that the power to do it will be held to be equally objectionable." What he has reference thereto is the argument that the province might, under its power to pass Orders-in-Council, enact regulations which would be plainly *ultra vires* as, for instance, dealing with the questions of name, and he says this. Of course, one must assume that the Executive would not act beyond its constitutional authority.

VISCOUNT CAVE: Is not this his way of dealing with the point? That is his answer to the point which he has put there. MR. WEGENAST: I thought he had passed away from the point. I do not see myself how it could affect it. It may be my Lord that that covers that point.

VISCOUNT CAVE: If compliance with certain regulations unwarranted by law was a condition precedent, then the corporation would be blocked, but he says we must assume there will be no regulations which are not warranted by law. MR. WEGENAST: I had in my mind more particularly the point that until the license was issued the company would be blocked.

VISCOUNT CAVE: I think it is covered by the words "unwarranted by law"—the proposition in the learned Judge's judgment. MR. WEGENAST: Of course, if it is assumed that the province has the authority to shut the company out pending the issue of the license, then the point is met.

Then the judgment continues at line 33: "In the memorandum (Exhibit 10), regarding licenses in Mortmain, paragraph 3 is practically the same as that held to be beyond provincial powers in the Deere case." I was going to point that out yesterday in connection with an interruption that when the Dominion company comes for a license in Mortmain, it should be required to change its name. Now, that raises the same issue in a sligthly different aspect. The regulation with regard to the name to which reference was made yesterday is applicable to Dominion companies when they come for a license in Mortmain.

VISCOUNT HALDANE: Yes. MR. WEGENAST: Then: "No question appears to be asked regarding this, but if it is a provincial regulation which has to be complied with before a license is granted, it is of doubtful validity notwithstanding the language of the cases which were relied on before us. I would answer the questions as proposed by my Lord the Chief Justice." Then comes the judgment of Mr. Justice Ferguson: "The facts are so fully set out and the authorities so

exhaustively discussed in the judgment of Mr. Justice Masten, appealed from, and in the opinion of my Lord the Chief Justice, which I have had the privilege of reading, that I shall content myself with stating my conclusions and indicating the grounds thereof: (1) I consider that the Extra-Provincial Corporations Act as originally enacted was passed on the assumption that it was within the legislative capacity of the province to assert and exercise control over all extra-provincial companies and to declare what companies should do business in Ontario and under what conditions and by license to regulate the exercise in Ontario of the corporate powers of such companies. (2) That in respect of the companies incorporated under the Companies Act of the Dominion, several amendments have been enacted with the object of making the Act conform to the trend of judicial opinion discussed and expressed in the authorities referred to in the argument, and in doing so to limit the control of the province to requiring these companies to pay taxes and to conform to the general laws of the province in respect of the administration of Justice and property and civil rights. (3) That, because, notwithstanding these amendments, it is in my opinion still within the power of the Lieutenant-Governor-in-Council, acting within the scope of the authority conferred upon him by the Act as amended, to require, among other things, an application for a license supported by a petition setting forth the facts and evidence required by Exhibit 10 (Regulations), particularly the facts required by the third paragraph thereof which reads as follows: 'That the corporate name of the corporation is not on any public ground objectionable, and that it is not that of any known company, incorporated or unincorporated, or of any partnership or individual doing business in Ontario, or a name under which any known business is being carried on in Ontario, or so nearly resembling the same as to deceive'"—that was section 18 of the British Columbia Act. "And because by section 11 it is required that the applicant shall establish to the satisfaction of the Minister that the provisions of the Act and the Regulations have been complied with, power is still conferred upon the Minister to refuse a license to a Dominion corporation otherwise entitled to it, if, for instance, its name in the opinion of the Minister conflicts with that of any other already incorporated or licensed to do business within the province. Such regulation and the granting of power to pass and enforce such regulation, whether exercised or not, is in my opinion contrary to the opinion of the Privy Council in the case of *John Deere* v. *Wharton,* 1915, Appeal Cases, page 330, consequently that the Act so framed is in this respect *ultra vires.* I did not agree with Mr. Justice Masten in his view that the purpose and effect of the Act has not, as to companies in classes 7 and 8, been changed by amendment 1 Edward VII., c. 19, s. 3, but am of the opinion that the amendments are not wide enough to cover the regulations. (4) That because the province in the exercise of its control over the property and civil rights prohibits all corporations, including its domestic companies, from holding real estate unless expressly authorized in manner provided by the Mortmain and Charitable Uses Act, R. S. O., c. 103, that the defendant company must obtain such license before exercising that power."

VISCOUNT HALDANE: He dissents. MR. WEGENAST: Yes, my Lord, he dissents partially.

VISCOUNT HALDANE: Now we have got these judgments which are all very valuable judgments. Chief Justice Meredith's judgment in particular is a very full and interesting judgment, and, whether we agree with it or not, we find it of very great value to have it before us. Now, the question is, Mr. Wegenast, whether you would like to deal with the John Deere Plow Company's case. MR. WEGENAST: But we have not yet read the Manitoba judgment, my Lord.

VISCOUNT HALDANE: We may, I think, at this stage have the John Deere Plow Company judgment. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: I understand by the arrangement we have made Sir John Simon is to intervene and perhaps it would be convenient to you that he should take up the matter now and finish by the adjournment to-morrow, and then you should resume, Mr. Wegenast. MR. WEGENAST: Yes, my Lord.

SIR JOHN SIMON: I am very much obliged to my learned friend, and I feel on personal grounds very unwilling to take his place temporarily. He knows the subject so well.

VISCOUNT HALDANE: It will not interfere with Mr. Wegenast, who has a great deal more to put before us. SIR JOHN SIMON: My Lords, I might perhaps be allowed to indicate what, on behalf of the Dominion of Canada, will be the summary of the heads under which we should seek to put our submission, because we are only in attendance on the Board to offer such considerations from the point of view of the Dominion as we would invite your Lordships to consider. We are not litigants in any ordinary sense, and the way in which it struck my friend, Mr. Asquith, and myself as being the clearest method of presenting the points from the Dominion point of view would be this. First of all I should argue this proposition: That the Provincial Acts that are embodied in this case, these three Statutes, the Manitoba Statute, the Ontario Statute and the Saskatchewan Statute too, I think — they may not be altogether on the same footing — are really indistinguishable from the British Columbia Act, which was held invalid in the *John Deere Plow Company, Limited* v. *Wharton*. And, my Lords, for that purpose what is necessary, of course, is to select the really fundamental proposition in the John Deere Plow Company's judgment to make sure that it does not turn on some entire and special consideration which will not arise again—it is easy to see that there is a much wider principle there laid down—and then, accepting, of course, that principle as we all must as a principle which is finally laid down in this record in dealing with such matters, one has the test to see whether or not these other Statutes differ materially. They, of course, differ here and there, but do they differ materially?

Then the second proposition which comes conveniently is this: That these Provincial Statutes, as we should very confidently submit, cannot be justified as being direct taxation in order to the raising of revenue in the province. That is a compartment of the argument which can be put very briefly. It is a very important one, and I have rather guessed from what I have heard my friend Mr. Nesbitt once or twice intervene to say, it seems to be sought to get through on that. I think it is possible to show, first of all, that will be quite inconsistent with the view of the John Deere Plow case, and, what is more important, that there is a broad distinction between the Provincial Statutes which may as an incident or accessory happen to produce a contribution, and the Statutes, Companies Acts and many other forms of Statute, which certainly cannot be said to be passed under the power of section 92; (2) which is limited to this: Direct taxation in order to the raising of revenue. That would be the second head.

Then the third head would be, and I do not think it is part of the argument which I shall spend time on, because it is pretty well admitted that the Dominion legislation, which is the foundation of the charters of these companies, is justified as an exercise of Dominion powers under section 91 (2). My learned friend mentioned it first, but I do not think that is really going to be contested. It is a perfectly good exercise of Dominion powers which sets up these companies.

VISCOUNT HALDANE: Under sub-section 2? SIR JOHN SIMON: Yes, my Lord, under sub-section 2. Exactly how far that goes, whether such a Dominion company is a company that in addition to being given this metaphysical existence also has by virtue of the Dominion legislation certain attributes in the character of powers and rights in different geographical portions of Canada—that is a matter your Lordships have fully before you, and I do not think it will need very much argument.

VISCOUNT HALDANE: We shall be glad to have your comment upon what Chief Justice Meredith says. SIR JOHN SIMON: I have noted that, my Lord, as being an interesting passage. Then, lastly, for my part, speaking for the Dominion, I quite see that there are perhaps two passages in the John Deere Plow case which might perhaps be argued for the respondents as suggesting a distinction. My learned friend and I think that we can show those passages do not really make an effective distinction. Those are the four heads under which the thing seems to me to fall, and if I may take the first one———

VISCOUNT HALDANES Will you give me a little more precisely your fourth point? SIR JOHN SIMON: My fourth point is that the passage in the judgment in the John Deere Plow case, which might seem adverse to the appellants' contention here, when they are really analysed will not be found to be so.

VISCOUNT CAVE: Those two towards the end of the judgment? SIR JOHN SIMON: Yes, my Lord. Those are those which seem to me to be the four heads under which the counsel for the Dominion might be expected to say one or two words. If I might take the first one, I will put my hand at once, if I may, to what we submit is the kernel of the John Deere Plow case for this purpose. It is in 1915 Appeal Cases, at page 341. There are other very important passages, but this is the passage on which the argument, in my submission, really will be found to turn. At page 341 of the judgment my Lord who is now presiding goes through a number of other matters, and incidentally sets out what the provisions of the British Columbia Acts are which are relevant, and then his Lordship goes on in the middle of the page to say this, and in my submission our contention here stands or falls according as we show that this passage has got an application to these other Statutes: "It follows from these premises that those provisions of the Companies Act of British Columbia, which are relied on in the present case"—I will show in a moment what those were—"as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice." Now, I quite concede for my part that if the two sentences which I have just read, which appear to me to be the kernel of the decision, if those two sentences are not sentences which can fairly be applied to these Statutes I shall probably turn out to be wrong. But that is not a casual phrase by any manner of means, as I am sure Lord Haldane will bear me out. He has gone most carefully in the earlier parts of his judgment, which has already run over six or seven pages of print, through the relevant provisions and through the Constitution set out in the British North America Act, and through the earlier authorities, such as the *Citizens Insurance Company* v. *Parsons,* and that is his conclusion. I invite your Lordships to see what it is he is referring to: "It follows from these premises that those provisions of the Companies Act of British Columbia which are relied on"—you will observe it is the "provisions"—"in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers."

Now, my Lords, I have found it myself, and perhaps I ought to say Mr. Asquith has done it for me, extremely convenient to be provided with the provisions in question of the British Columbia Act, and to set them side by side with the provisions—let me take the Manitoba Act here, and by making simply two parallel columns of half a dozen references you will see the very sentences which my Lord there pronounces if my submission applies, and applies directly and expressly to the corresponding provisions in the Manitoba Act. Now, my Lord, from these I may venture to give you the things in parallel form, and for that purpose your Lordship will find it convenient to do this. First of all, in the book before your Lordships, the Appeal book, the ordinary Record, you will find that at the end of it—you need not trouble about those tabs———

VISCOUNT HALDANE: As Mr. Asquith has made a very full list for you, if it is convenient we should like to have copies of this in the morning. SIR JOHN SIMON: I can give your Lordship typed on a half sheet of paper the two columns contrasted.

VISCOUNT HALDANE: That will be most convenient. Will you be good enough to see that is done to-morrow? SIR JOHN SIMON: Yes, my lord, I might perhaps just indicate this first of all.

VISCOUNT HALDANE: Does it include Ontario and Saskatchewan? SIR JOHN SIMON: I can do it, my Lord.

VISCOUN HALDANE: Mr. Asquith can do that for us, and then we can have them in the morning. SIR JOHN SIMON: I am sure we can. At any rate I begin with Manitoba, and the reason is this, that if you take the ordinary Appeal Book and turn to the end of it at page 132, there you will find set out in the book the Revised Statutes of Manitoba, the Manitoba Statutes we are talking about. Now, if you will take the other book, this little collection of Statutes here, my learned friends have very conveniently included in it the British Columbia Statute, so that if

one has the British Columbia Statute in the one hand, and the Manitoba in the other, you will find it most convenient.

VISCOUNT HALDANE: We have the Manitoba in this book. SIR JOHN SIMON: Yes, my Lord, that is the book. Your Lordship has the British Columbia Statute in that book.

VISCOUNT HALDANE: We have the Manitoba Statute also. SIR JOHN SIMON: Yes, I was thinking if you got one in one hand and one in the other you have them together, and you have only to read across. It is the one which immediately follows the blue one. Will your Lordship notice this. The one you have before you at the moment, the British Columbia one, contains the relevant provisions of which, as your Lordship says on page 341 of 1915 Appeal Cases, "as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes," and my point is that we can show by the simplest form of contrasted columns, or by taking the British Columbia Statute in the one hand and page 132 of the book in the other, that we have merely to pass from one to the other, and one sees that they are the same for all material purposes.

VISCOUNT HALDANE: British Columbia and Manitoba? SIR JOHN SIMON: Yes, my Lord.

VISCOUNT HALDANE: What do you say about the others? SIR JOHN SIMON: I will deal with the others, my Lord, but I will take Manitoba as being one first of all, which I can very conveniently put in this way because I have one in one book and one in the other.

VISCOUNT HALDANE: There is enough of it here. SIR JOHN SIMON: Yes, my Lord. The references are these. I will not trouble your Lordship to do more than to follow me in this. First of all, in the British Columbia Act there was section 139, and that, my Lord, you will find set out in the smaller book. Really it is merely a question of making half a dozen comparisons. If your Lordship will look at section 139 of the British Columbia Statute, that is one of the sections which in the British Columbia Statute, as your Lordship says in your judgment, sought to compel the appellant company to obtain a provincial license.

VISCOUNT HALDANE: Will you be good enough to see that copies of these comparisons are also given to Mr. Nesbitt and Mr. Henn Collins. SIR JOHN SIMON: Yes, certainly, my Lord. I would not give your Lordship anything I did not give my learned friends, of course. Now, will your Lordship just cast your eye on section 139, which is immediately under your hand. This is one of the sections which your Lordship remembers in the John Deere Plow Company's case was inoperative. Now, what does it say? It say: "Every extra-provincial company having gain for its purpose and object within the scope of this Act is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the province until such extra-provincial company shall have been licensed or registered as aforesaid." Now, my Lord, not losing that page, but turning to the big book which is before your Lordship, would your Lordship look at section 118 of the Manitoba Act? You will find it is the same thing.

VISCOUNT HALDANE: Is it word for word the same? SIR JOHN SIMON: No, my Lord, but in substance it is. I am comparing section 139 of the British Columbia Statute, which already stands condemned, with section 118 of the Manitoba Statute, which I invite your Lordships to condemn. That is the point of identification: Section 139 of the British Columbia Statute and section 118 of the Manitoba Act. Now, if you will look to satisfy yourself, you will see that section 118 of the Manitoba Statute provides this: "No corporation coming within class V. or VI."—that is a Dominion corporation—"shall carry on within Manitoba any of its business unless and until a license under this part so to do has been granted to it, and unless such a license is in force, and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in other capacity for any such corporation, carry on any of its business in Manitoba

unless and until such corporation has received such license and unless and until such license is in force."

VISCOUNT HALDANE: Both Statutes enact that without a license the corporation is not to exercise its powers. SIR JOHN SIMON: Yes, my Lord. The only difference is this. It is not in the least material or substantial, but I point it out, that in the British Columbia Statute, section 139 said that the company must both be licensed and be registered. In the Manitoba Statute the provision is that the company shall be licensed.

VISCOUNT CAVE: Licensed or registered? SIR JOHN SIMON: Yes, my Lord. One is either and other is only one. It is unarguable that these are different.

VISCOUNT CAVE: In the Manitoba Statute you have got a section which says, to put it shortly, that a Dominion company shall be entitled to a license as of right. SIR JOHN SIMON: I will deal with that my Lord. I think your Lordship is right, but the point is with great respect, though that, of course, must be carefully borne in mind, if the test of *ultra vires* is: is the section one which compels an appellant company—quoting Lord Haldane's words—" to obtain a license," I agree there is an additional fact, but if the test is: Is this legislation which compels the Dominion company to obtain a license as a condition of carrying on its business, then the parallel seems to be complete, and you do not get over that by saying: yes, I insist you shall obtain it.

VISCOUNT CAVE: But you shall get it. SIR JOHN SIMON: Yes, my Lord.

VISCOUNT HALDANE: Section 139 of the British Columbia Act says " licensed or registered." SIR JOHN SIMON: Yes, my Lord.

VISCOUNT HALDANE: It looks as if they were treated as equivalent. In the other case the only thing is licensed. SIR JOHN SIMON: Yes, that is all, my Lord. Now, the next comparison is even simpler.

VISCOUNT HALDANE: I think we must pause here, Sir John. SIR JOHN SIMON: To-morrow morning I shall submit what I will ask my learned junior to prepare, a list of references which your Lordships require.

(Adjourned to to-morrow morning at 11.30 a.m.).

THIRD DAY.

SIR JOHN SIMON: My Lords, I am anxious to begin this morning by reminding your Lordships that I am arguing by reference to page 341 in the judgment in the John Deere Plow case that if we find provisions which compel the appellant company to obtain a provincial license, or to be registered, then I am well posted for the argument that as in British Columbia, so in this case, these provisions will be inoperative for the purpose of compelling such registration.

VISCOUNT HALDANE: Of course; we must take that in its context. In the British Columbia case we came to the conclusion that those words were introduced for the purpose of diminishing what would otherwise have been the powers of the corporation. SIR JOHN SIMON: I quite follow that.

VISCOUNT HALDANE: If they were merely introduced for collecting a tax it might be different, might it not? SIR JOHN SIMON: I think it might. With that in mind I would rather like if your Lordships do not think I am departing from the plan I made out just to deal in a compartment now with that which I mentioned secondly, namely, the suggestion that these Provincial Acts con be justified as taxation, because if they were they might be no doubt necessary to my case. It is not that I am shrinking from the first point, but it is convenient to take the second. The way I should seek to put it would be this on the second point that really these Provincial Statutes cannot be justified as taxation under section 91, head 2. Section 92, head 2, we frequently refer to as though it simply authorized direct taxation, uses these words " direct taxation within the province in order to the raising of a revenue for provincial purposes." It is rather striking that the test of the object, the test of the purpose aimed at, is to be found under the heads of section 92, only I think in head 2 and sub-head 9 in head 2 you get " direct taxation within the province in order to the raising of a revenue for provincial purposes:" in head 9

you get the phrase: "Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes." That, as your Lordships know, has been observed upon in the cases particularly in connection with discussing what really is a license duty.

VISCOUNT HALDANE: Does that mean more than this, that you cannot raise money by direct taxation in the province for matters that are not confined to the province? SIR JOHN SIMON: I was thinking it was a little more than that. I submit it is to this extent in the framework of the Act that you cannot classify a particular piece of legislation as falling under section 92, head 2, without having regard to what on an examination of the Statute is the real object of the legislation.

VISCOUNT HALDANE: That may be so. The Dominion under section 91 can tax directly, and also indirectly, and it can raise taxes for any purpose. SIR JOHN SIMON: Quite so.

VISCOUNT HALDANE: The province can raise revenue for provincial purposes. It becomes extraordinarily difficult to say what purpose the province had in view when it raised revenue which may be for general provincial purposes. SIR JOHN SIMON: I am not for the moment putting forward the argument that this falls on one side of the line or the other. I was merely submitting that on the construction of section 92, head 2, it is pretty clear that it certainly is not conclusive to say: I find in this bundle of sections—there are some 200 sections of the Companies Act—a section which has the incidental consequence that a payment of so many dollars is made to a particular public collector, *ergo* this is direct taxation in order to the raising of a revenue.

VISCOUNT HALDANE: You are entitled to say that. It is when you get to the application of it that the difficulty comes. SIR JOHN SIMON: I quite agree it is a difficulty, if I may remind your Lordships, which in quite a different connection is sometimes raised in this country, perhaps more particularly in the application of a section of the Parliament Act, a section which every year comes to be applied, a section which requires the Speaker of the House of Commons to certify that a particular Bill is within the meaning of the Parliament Act, a money Bill. That as your Lordships know has again and again raised nice questions. It is quite plain that a Bill like the National Insurance Act, or the Companies Act itself, or many other examples of legislation which occur to one familiar with legislation here, are not, of course, bills which are money bills within any definition of that sort. That is the class of distinction.

VISCOUNT HALDANE: The Speaker certifies as to the character of the bill. SIR JOHN SIMON: Yes.

VISCOUNT HALDANE: Not with regard to the end to which the money is to be applied. SIR JOHN SIMON: That is quite true. Therefore, we say first of all without applying it to this case, obviously the mere fact that incidentally, or accidentally, or even as part of the machinery, the Provincial Statute results in a payment of so many dollars to the provincial fiscus does not in itself make the Statute come within the protection of section 92, head 2: indeed if it did that would have been a complete answer in the John Deere Plow case; it would have been equally true there.

LORD PARMOOR: I understood that the learned Judges in the Court below on this point thought they were governed by the decision of the Privy Council in the Lambe case. SIR JOHN SIMON: I am going to deal with that.

LORD PARMOOR: If you look at the John Deere Plow case you have to consider the question of whether even if it was direct taxation it might not interfere with the status. The Lambe case was specifically considered in the John Deere Plow case. SIR JOHN SIMON: I am going to ask your Lordships to look at the Lambe case for this purpose. When it is looked at it will be observed that the issue in the Lambe case was not by any means this issue. The issue in the Lambe case was, admitting that this is a tax, is it a direct tax? That was the point in the Lambe case, and the only point in the Lambe case. The Lambe case is reported in 12 Appeal Cases.

VISCOUNT HALDANE: There was a case of the *Queen* v. *Reed* which gave rise to a great controversy. Was that decided before or after the Lambe case? MR. WALLACE NESBITT: I think before, that was the Stamp Act case.

VISCOUNT HALDANE: Yes. MR. WALLACE NESBITT: It was held to be indirect taxation.

SIR JOHN SIMON: It is a class of question which has arisen as we all know pretty often. It is really worth while referring to it. The Lambe case is reported in 12 Appeal Cases, at page 575. I feel that there are difficulties in some parts of this argument, but I cannot say that I feel any difficulty about this.

LORD PARMOOR: I am not expressing any opinion, but some of the Judges in the Courts below seem to have thought this point was decided by the Lambe case. SIR JOHN SIMON: It is for that reason that I venture to deal with it.

VSCOUNT HALDANE: That is a strong case, because banking is one of the exclusive subjects under section 91 given to the Dominion, and yet it was held that the province might tax the banks. SIR JOHN SIMON: I want your Lordships to observe this, that the whole point of the Lambe case will be found to be this. Will your Lordships turn to the judgment at page 580, and onwards. There were really two points in the Lambe case, and only two. The first was: Is this tax a direct tax? Your Lordships will observe at the bottom of page 580 this passage: "The principal grounds on which the Supreme Court rested its judgment were as follows: That the tax is an indirect one; that it is not imposed within the limits of the province; that the Parliament has exclusive power to regulate banks; that the Provincial Legislature can tax only that which exists by their authority or is introduced by their permission, and that if the power to tax such banks as this exists, they may be crushed out by it, and so the power of the Parliament to create them may be nullified. The grounds stated in the decree of the Queen's Bench are two, viz.: that the tax is a direct tax, and that it is also a matter of a merely local or private nature in the province, and so falls within class 16." The point to observe is that with all that material for contention one point is common ground, and that is that the thing in question was a tax. That is perfectly plain, and indeed it was in this case that at page 582 the quotation was made from John Stuart Mill, which has occurred again in the course of the argument. It is a class of subject on which my Lord's description of the difference between a direct and indirect tax was set out at some length, and was in fact adopted as a sound test for this purpose, and if your Lordships turn back you will observe—it is really overwhelming—to the beginning of the judgment it says at the top of page 580 the legislature had passed a Statute to impose certain direct taxes on certain commercial corporations. The tax itself not only was, but professed to be by its label and contains a taxing Statute, and the question in the case was: granted that it is a taxing Statute, granted that it is a tax, is it a valid exercise of the power under section 92, head 2?

VISCOUNT HALDANE: As it was a tax on the very person who was to pay the tax, the corporation, therefore it was a direct tax. SIR JOHN SIMON: Yes.

VISCOUNT HALDANE: That is true here also. SIR JOHN SIMON: My point for the moment is that Lambe's case is not an authority which decides in some ambiguous case that though the subject-matter of the legislation dealing with companies, or whatever it may be, though defined as a tax, or labelled as a tax, is admitted to be a tax, none the less it is covered by section 92, head 2. It is a case in which everybody proceeded upon the basis as the fact was; this is a tax as plain as possible, but is it a direct tax?

LORD PARMOOR: What was actually in issue was an imposition, I will call it, not a tax upon a corporation in almost exactly the form there as here. SIR JOHN SIMON: With great respect, I do not at all agree that it is in the same form. It seems to me to be in a fundamentally different form. The Statute which was then being discussed was a Statute—it has been very conveniently bound up in this collection of Statutes, and your Lordships will find it in the last but one in the book—of the Province of Quebec imposing taxes upon certain commercial corporations, commercial partnerships, associations, firms and persons. The point is, that in the *Bank of Toronto* v. *Lambe* you had what was a straightforward imposition of the Act, and the issue, the first and main issue in the case, was this: There can be no question whatever that this purports to be the imposition of a tax and is the imposition of a tax, but is it the imposition of a direct tax, or are direct taxes, income tax, and taxes of that character, but not a tax such as this? That was the issue. There was no question raised in the *Bank of Toronto* v. *Lambe* at all such

as we are submitting is involved in the present appeal, and such as was inferentially raised, and decided in the John Deere Plow case, and there is no question, therefore, as to whether a bundle of sections which are really passed *alio intuitu* altogether must be classed as being taxation because one of their sections contains a provision that in return for a license or registration somebody has to pay a fee.

VISCOUNT HALDANE: There are some very material things in Lord Hobhouse's judgment on page 585. SIR JOHN SIMON: I will deal with it now. Really I am quite confident about my submission here. I may be right or wrong in the present appeal, but the *Bank of Toronto* v. *Lambe* was a case that did not raise the point at all whether notwithstanding the general character and object of the legislation it was enough to make it a tax because there was some incidental provision. That is quite clear. That is not what it was at all. The question was: granted this is an Act in order to the raising of revenue, it is a particular kind of tax which the Province can impose. The argument on the other side was that it was not. Lord Hobhouse in his judgment points out that as a matter of fact the imposition is such that it is borne, and intended to be borne, by the persons who are called upon to pay it, and he says in view of that it is direct.

VISCOUNT HALDANE: Just follow that step by step. You say this is a tax, if it be a right tax, which is to be paid by the very persons on whom it is imposed. SIR JOHN SIMON: I am not suggesting that in the present case the appellants should succeed because though this is a tax it is an indirect tax. I am suggesting that the *Bank of Toronto* v. *Lambe* is no authority whatever to get out of the appellants' contention any more than it was in the John Deere Plow case, none whatever, because what the *Bank of Toronto* v. *Lambe* decides is that a particular kind of imposition, which is admitted to be the object of the Statute, and the very object, in order to secure which the law is passed, is a matter of fact that class of tax which the economists and lawyers in written Constitutions properly describe as a direct tax. There was only one other point in that case at the very end of the judgment.

VISCOUNT HALDANE: Just in the middle of page 585 are some very revelant observations it seems to me. SIR JOHN SIMON: I was wrong in saying there was a second point. I will read at page 585, if I may. Just to summarize the earlier part of the judgments your Lordships see at page 579 Lord Hobhouse says this case raises difficult questions as between provincial and Dominion power. Then he sets out at the bottom of page 579 what the Statute is, and he starts off, not as one of the things he is going to decide, but as one of the things which is the basis of what he is going to say, the Quebec Legislature passed an Act to impose a certain direct tax on certain commercial corporations. Then he goes on to say: "The bank resists payment of the tax in question on the ground"—not that it is not taxation; of course, it is—"that the Quebec Legislature had no power to pass the Statute which imposes it." Then he sets out the grounds, the main ground of which is that it is indirect taxation. Then on page 581 he says: "To ascertain whether or no the tax is lawfully imposed, it will be best to follow the method of inquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of section 92 of the Federation Act, viz.: 'Direct taxation within the province in order to the raising of a revenue for provincial purposes?' Secondly, if it does, are we compelled by anything in section 91 or in the other parts of the Act so as to cut down the full meaning of the words of section 92 that they shall not cover this tax?" He says first, it is a direct tax, and then he refers to the views of political economists, and on page 582 he sets out a well-known passage from John Stuart Mill's Political Economy, which has been cited before your Lordships' Board in some other and rather more difficult cases on the point. At page 582 at the bottom he says: "It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's work for the purpose of ascertaining precisely what he does say on this point; nor, would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind." It is perfectly plain that he is there dealing, not with the issue: Is this a tax, but what kind

of tax is it? On page 583 he points out that the tax is carefully designed for the purpose of securing "that the very corporation from whom the tax is demanded should pay and finally bear it." He goes on to deal with the very well-known distinction in economics and politics. Then on page 584 he refers to the Queen Insurance case where he says: "the disputed tax was imposed under cover of a license to be taken out by insurers. But nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurance, each of which was to be stamped accordingly. Such a tax would fall within any difinition of indirect taxation." He says that has nothing to do with it. Then he refers to Reed's case, which I think your Lordships have in mind, which is reported in 10 appeal cases, two years before, and to Severn's case.

MR. WALLACE NESBITT: Severn's case was reversed in the Brewers and Maltsters' case. It is the same point.

SIR JOHN SIMON: I quite agree. I am only passing it over because it was reversed here, and the Brewers and Maltsters' case I am going to deal with later. Then Lord Haldane pointed out that there was a passage at page 585. Where would your Lordship wish me to begin?

VISCOUNT HALDANE: He has now got to the second point, the question of whether there are words in section 91 which cut down what he has now come to the conclusion to be the general power. SIR JOHN SIMON: I will read it, but with this clearly in mind I hope. I think your Lordships follow the contention that I was endeavouring to express. Of course, our case here is that you do not get over the first of these Statutes. This is not really legislation to secure a direct tax on order to the raising of the revenue, and, therefore, this second consideration is only incidentally important, but I will, of course, gladly do it.

VISCOUNT CAVE: You notice the last two sentences on page 584: "It is true that all the judges expressed opinion that the tax, being a license duty, was not a direct tax. Their reasons do not clearly appear." SIR JOHN SIMON: That is referring to Severn's case.

VISCOUNT CAVE: It does not matter what it is referring to. It does throw doubt upon the proposition that a license duty is not a direct tax. SIR JOHN SIMON: I think in some cases it might conceivably be; I am not sure, but at any rate the only reason I pass for the moment without more thorough argument the reference to Severn's case is that Severn's case is the Brewers' case; it is coming up to the Privy Council in a later report, and there the Privy Council dealt with it fully. When we come to the Brewers' case we shall see how the whole thing stands together. Then Lord Haldane suggested that some passages on page 585 were important.

VISCOUNT HALDANE: Yes. SIR JOHN SIMON: "Then is there anything in section 91 which operates to restrict the meaning above ascribed to section 92? Class 3 certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the Provincial Legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of Parsons. Their Lordships there said: "So 'the raising of money by any mode or system of taxation is enumerated among the classes of subjects in section 91; but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes,' assigned to the Provincial Legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one.' Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the Provincial Legislatures." I think I have called attention to what is the real point of this judgment.

VISCOUNT HALDANE: I think the next paragraph is of some importance. SIR JOHN SIMON: I will read it: "It has been earnestly contended that the taxation of banks would unduly cut down the powers of the Parliament in relation to matters falling within class 2, viz.: the regulation of trade and commerce; and

within class 15, viz.: banking and the incorporation of banks. Their Lordships think that that contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the province where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks." Let me say again that assume you had a Statute which by admission, or by its plain interpretation, is a Statute passed by the province for the direct taxation of corporations, I apprehend that the *Bank of Toronto* v. *Lambe* is an authority for the proposition that you could not get out of that imposition by simply saying I am a bank.

LORD PARMOOR: Is there any difference if you do the same thing whether you happen to call it taxation or not? SIR JOHN SIMON: It does not depend, I agree, upon the label; names are a very bad guide in these cases; it depends on something more thon that. The Companies Act, or a National Insurance Act, or Statutes aiming at the regulation of some branch of trade or commerce, are not turned into taxing Statutes merely because incidentally, or accidentally, payment is to be made. I must point out that that really is involved inferentially in the John Deere Plow case, though, of course, the authority for it is for more general than any particular decision.

LORD PARMOOR: At one time any charge of that kind upon a subject was regarded as taxation in this country.

VISCOUNT HALDANE: Before you pass from Lambe's case there is a good deal on page 586. SIR JOHN SIMON: I will read it; I am obliged to your Lordship.

VISCOUNT HALDANE: That is relevant to what Lord Parmoor has just said. SIR JOHN SIMON: I am obliged to your Lordship.

VISCOUNT HALDANE: It is followed by something which is relevant to an observation made by Mr. Wegenast when he suggested invoking the decisions of the Supreme Court of the United States. Lord Hobhouse expressed the same hesitation as I felt about referring to the opinions even of so great a Judge as Chief Justice Marshall, for the reason that he is dealing with a very difficult thing. He is dealing with a Supreme Court which is an integral part of the Constitution of the United States, and has extraordinarily wide powers. Whether you find them in the words of the American Constitution or not they have been imported into it by nobody so much as by the dominating power of Chief Justice Marshall. MR. WALLACE NESBITT: He created it.

SIR JOHN SIMON: That is a very interesting branch of the argument, but is no branch of the particular argument I am trying to compress. I am not seeking to make any reference to American authorities.

VISCOUNT HALDANE: Something like policy comes into the judgments of the Supreme Court of the United States. SIR JOHN SIMON: Yes, my Lord. Here we keep ourselves as far as may be away from considerations which are not of a strictly legal character.

VISCOUNT HALDANE: If you read Chief Justice Marshall's judgment in *Marbury* v. *Madison* (1 Cranch 137), where he came into conflict with precedents, you will see what a great difference there is between the view there and the view here. SIR JOHN SIMON: I will summarize what I wish to say on the *Bank of Toronto* v. *Lambe*.

VISCOUNT HALDANE: I want you to call Lord Parmoor's attention particularly to page 586. SIR JOHN SIMON: "They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words 'regulation of trade and commerce' are indeed very wide, and in Severn's case it was the view of the Supreme Court that they operated to invalidate the license duty which was there in question. But since that case was decided the question has been more completely sifted before the Committee in Parsons' case, and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the Provincial Legislatures. It was there thrown out that the power of regulation given to the Parliament meant some general or inter-

provincial regulations." In another connection the argument I am going to present to the Board will refer to that passage. I was for the moment dealing with the question: Can this be classified as direct taxation? "No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in Parsons' case, they would be straining them to their widest conceivable extent."

VISCOUNT HALDANE: Then he says at the end summarizing the next paragraph that the mere fact that his power might be used for the purpose of crushing out the Dominion corporation is no reason for holding that what is done in the particular case is invalid. SIR JOHN SIMON: No.

LORD PARMOOR: It has been held that what is called taxation is no interference with what has been called the status of a Dominion company. SIR JOHN SIMON: I think so.

VISCOUNT HALDANE: There is an admission to that effect on page 581. "It has not been contended at the Bar that the Provincial Legislature can tax only that which exists on their authority or permission." Then if you look at page 343 in the John Deere Plow case there is the same thing. Their Lordships say there, speaking about this, or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company." Therefore it seems to be a question of whether it is a case of direct taxation. SIR JOHN SIMON: That was the particular point I was dealing with, and I put my case in this way. As far as I am concerned I do not wish in any way to say that there are not more extensive arguments to be adduced. I say first of all, it is not enough to say that it is an incident in this Companies Act which at any rate, as one can see, contains a whole code of company law, that as a result of one section fifty dollars, or whatever amount may be, is paid to be provincial fiscus. That does not make the thing *per se* necessarily and inevitably an exercise of power under section 92, head 2, and I venture to think that that class of question might very well have been ventilated in the John Deere Plow case. What must be looked at is necessarily the question whether the Provincial Statute is valid under the second head of section 92 is the pith and substance. The expression pith and substance has often been used. Its actual source of origin and home is to be found in the *Union Colliery Company* v. *Bryden* in 1988 Appeal Cases.

VISCOUNT HALDANE: That is an important case? SIR JOHN SIMON: Yes. It is the *Union Colliery Company* v. *Bryden*. It is a case which your Lordship argued, and there is a very valuable judgment of Lord Watson, at page 580. The passage about the pith and substance is to be found in Lord Watson's judgment, at page 587. It is a case Lord Haldane will remember as he was concerned in it. The question was whether the British Columbia Statute which prevented Chinamen from being employed in underground mines—it is like our Statutes which prohibit the employment of children in underground works—was a valid exercise of the powers of the province.

VISCOUNT HALDANE: I remember I argued unsuccessfully with the late Mr. Blake. We appeared for the province, and said: This is legislation as to mines, and it is exclusively within the jurisdiction of the province, but the Board took a very strong view from the beginning that "Property and Civil Rights" enabled the Dominion to deal with the matter. SIR JOHN SIMON: Your Lordship's recollection of the topic discussed is perfectly accurate, but your Lordship is doing your argument an injustice. The argument prevailed.

VISCOUNT HALDANE: Yes, it was quite the other way. SIR JOHN SIMON: The decision was that, although regarded as a coolie working regulation, it was a thing which the British Columbia Legislature could perfectly well make, but inasmuch as it really attacked Chinamen, and touched upon aliens as such, it really was not a valid exercise of the Provincial power.

VISCOUNT CANE: The decision was reversed? SIR JOHN SIMON: Yes.

MR. WALLACE NESBITT: Your Lordship was for the province in that case. The province was beaten.

SIR JOHN SIMON: I thought your Lordship said the province succeeded.

VISCOUNT HALDANE: I remembered it wrongly. The one thing I remembered was, the distinction was—they would have none of my argument before the Board—admittedly it was within the exclusive competence of the Dominion so far as they were aliens, but Chinamen, after all, were people working within the province; and it was property and civil rights. SIR JOHN SIMON: I think one of the arguments which occurred to your Lordship's ingenious mind was that a Statute which spoke of Chinamen was not necessarily speaking of aliens at all, and it merely referred to the colour of their skin, or the home of their ancestors, and that it was perfectly consistent with the Statute as really dealing with persons of a particular origin who might none the less be naturalized British subjects.

VISCOUNT HALDANE: I said: There are a number of these Chinamen who are naturalized; why should not they be legislated for just as much as verminous people. SIR JOHN SIMON: That particular illustration is not to be found in the reports. The pith and substance passage comes at page 587. I do not think I need read much. Lord Watson says, at page 587: "Their Lordships see no reason to doubt that, by virtue of section 91, sub-section 25, the Legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulations Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens, or naturalized subjects." That was the point. It is convenient, perhaps, to have that reference as showing where the phrase comes from. Another phrase which is often used is "the true nature and character of the Statute." That expression your Lordships will find in *Russell* v. *The Queen,* which is in 7 Appeal Cases, which begins at page 838.

VISCOUNT HALDANE: *Russell* v. *The Queen* was a development of Severn's case. My recollection is that it related to the McCarthy Act? MR. WALLACE NESBITT: No, not the McCarthy Act, the old Scott Act.

VISCOUNT HALDANE: And it was held that under the words "Regulation of Trade and Commerce" you might regulate the liquor trade right through the Dominion. That was Severn's case. The McCarthy Act was the subject of the Ontario reference, was it not? MR. WALLACE NESBITT: No. The McCarthy Act was passed by the Dominion Government on the faith of *Severn* v. *The Queen,* hoping to get control of the liquor trade throughout the Dominion.

VISCOUNT HALDANE: Which case did it come up in? The McCarthy Act came up in the later case? MR. WALLACE NESBITT: Yes, we had it here in another case afterwards.

VISCOUNT HALDANE: I have forgotten what it was. I was sure I was in it. Was it the Ontario Reference? MR. WALLACE NESBITT: That was in the Ontario Reference.

VISCOUNT HALDANE: That is the one that is reported in a private volume; I have it in my library because I happened to be in it, and they gave me a copy, and, if I remember rightly, no reason was given. MR. WALLACE NESBITT: No, there could not be if *Russell* v. *The Queen* was to stand.

VISCOUNT HALDANE: That was the reason. MR. WALLACE NESBITT: I do not know that, of course.

SIR JOHN SIMON: The point I want to make on *Russell* v. *The Queen* is a point that does not depend on considering precisely the contents of any particular temperance legislation. There is, in my submission, an extremely important passage which is to be found on page 839, and it is a passage which has direct application here. It is in 7 Appeal Cases, and the two passages to which I wish to refer are one at the top of page 839, where your Lordships will notice the phrase: "That is the primary matter dealt with," and the other passage at the very bottom of the page, a sentence beginning "The true nature." Those, I venture to think, are important passages. Dealing with the first question, Sir Montague Smith says: "What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public safety. That is the primary matter dealt with, and though incidentally the free use of things which man may have property is interfered with, that incidental interference does not

after the character of the law." Then at the bottom of the page: "The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects 'Property and Civil Rights' within the meaning of sub-section 13." The submission that I venture to make on behalf of the Dominion is, therefore, that you cannot dispose of these impeached Provincial Statutes by proving that they contain a provision by which incidentally to its purpose there is to be a payment made unless you are prepared to go further and say that the true character of the law differs, having regard to the primary matters dealt with, or as it is put a little later, the true nature and character of the Legislature is such as to answer the question into which class you would put it in having regard to the general view of the law. It is the same pith and substance. You must look at the whole Statute. Therefore, on this head, I submit, first of all, that it is not enough to make the Provincial Statute come within section 92, head 2, to suggest there are some incidental or accidental conditions which may have the effect of exaction; consequently, that the test is a test of the pith and substance, as Lord Watson said, or the true nature and character, as Sir Montague Smith said.

VISCOUNT HALDANE: I think Mr. Nesbitt would probably concede that. You must look at the Statute as a whole to see what the proper meaning is. MR. WALLACE NESBITT: Yes.

SIR JOHN SIMON: What its pith and substance are. Then, my Lord, my third proposition is, if that is right, if we agree a mere incidental or accidental reference which involves an exaction is not enough; if we agree that the test is a test of the pith and substance, or the true nature and character of the Statute, or in other words what is Parliament dealing with when it passes it——

MR. WALLACE NESBITT: Do not take my admission if it affects your argument. This is a double Act, a taxing Act and a statistical Statute.

SIR JOHN SIMON: I quite recognize that my learned friend is at liberty to challenge my case, but I say first an incidental or accidental reference is not enough, secondly the pith and substance or true nature and character is the real test, and then comes the question, is the pith and substance of those Acts taxation?

VISCOUNT HALDANE: How far can you say that a Dominion company is differentially treated in the original Statute? SIR JOHN SIMON: I have not quite followed how that relates to the particular argument I am addressing to the Board.

VISCOUNT HALDANE: How far can you say differential treatment is afforded to a Dominion company as against a Provincial company? SIR JOHN SIMON: I am coming to that.

VISCOUNT HALDANE: I think it is very important on what you are now saying. SIR JOHN SIMON: I think it is.

VISCOUNT HALDANE: If it is a uniform system, one would be naturally more ready to say this is general taxation. SIR JOHN SIMON: Yes, I think it is rather from that point of view that Mr. Wegenast was pointing out that there can be no question that the result of this as it stands is that the formation of a company in a province is the only practical and economical course, and the formation of a company in the Dominion merely lands the company with an additional burden.

LORD PARMOOR: I have been reading what Mr. Wegenast said in the John Deere Plow case. He says: Is the effect of the legislation the control of the corporate rights and privileges of the company, or is the effect merely to regulate the manner in which their business is to be carried on in the province? That is from the argument in the John Deere Plow case. I thought that put the two things very clearly. SIR JOHN SIMON: I think it does admirably. May I point out that the reason is one of the reasons why in the John Deere Plow case the issue now suggested so prominently, taxation, does not appear very prominently in the argument because indeed, as appears from the report of the argument, Lord Moulton said, "I know of no case of taxation that is covered by anything like that. I should suspect a provision which purported to be taxation and made a man an outlaw unless he paid."

LORD PARMOOR: I think the importance of the case is that it does decide that the question of direct taxation was competent to the Legislature which enacted the legislation in question. SIR JOHN SIMON: If convenient I should like to deal with the particular observation which Lord Parmoor made to me before the last one. I understood my Lord to say this. I was trying to put together three different considerations with regard to whether this could be regarded as direct taxation. My Lord was saying he wished to read an extract of what was said by Mr. Wegenast in the John Deere Plow case.

LORD PARMOOR: I took it from his argument. SIR JOHN SIMON: May I be permitted to say that in the John Deere Plow case their Lordships expressed the strongest possible view in the course of the argument that it was preposterous to regard the Statute as being direct taxation, and the real reason why the argument does in fact take the form in which it does is because that was really not the issue in that case. That is why I was venturing to read to Lord Parmoor, if he will follow it, not something from the Lambe case, but something from the very argument which he was reminding me of, the observation made more than once, made in its widest form by Lord Moulton, sitting on this Board, and I adopt his observation: I know of no case of taxation that is enforced by anything like that. I should suspect a provision like that which you purported to be taxation for a trumpery account and made a man an outlaw unless he paid.

VISCOUNT HALDANE: What are you reading from? Is that the Quebec case? SIR JOHN SIMON: No, this is the argument in the *John Deere Plow Case* v. *Wharton,* a shortened account of it, which his Lordship has just been referring to. I am not saying it binds anybody, but if I was presenting an argument about direct taxation, and it was to be suggested that a difficulty in my way was that the report of the argument in the Law Reports does not contain this kind of contention, with great respect the answer is that this contention is disposed of.

VISCOUNT HALDANE: You may look at what is said to show that the point was raised, but speaking for myself I protest at any importance being attributed to any interlocutory observation of mine. SIR JOHN SIMON: All I was endeavouring to put, I hope not at too great length, were three considerations which it seems to me should be consecutivedy considered on this issue: is this Statute properly to be regarded as an exercise of the provincial power to pass laws dealing with direct taxation in order to the raising of revenue for provincial purposes? If it is suggested that in the argument as reported in the Law Reports you do not find anything about it the answer is not because in fact the contention or the suggestion that it was direct taxation was scouted, not in the least. I do not cite this as having judicial or final authority, but merely as a way of putting the point. There is stated the pith and substance, or the true nature and character which is, I submit, quite plainly to require the registration of companies and to regulate their trading or commercial dealings, with an incidental provision which calls from a State point of view a small contribution, though serious, from the company, if it should be enforced by a process which outlaws the company if it does not pay.

VISCOUNT HALDANE: So far as it goes the John Deere Plow case is in your favour. SIR JOHN SIMON: Yes.

VISCOUNT HALDANE: That is what Mr. Nesbitt says, they provide the legislation. SIR JOHN SIMON: Yes, therefore my submission on this consists essentially of three propositions, the character of which can only be appreciated if the third question is stated after stating the previous two.

VISCOUNT HALDANE: Will you just state your three propositions. SIR JOHN SIMON: The first one your Lordship already has and the second one. The third one is this. The pith and substance of these Statutes is not taxation, for their true nature and character has nothing to do with it. The money which is to be paid is insignificant when contrasted with the extraordinary severity of the penalties which are exacted. To outlaw a company because it does not pay a fee is not a proof that this is taxation. If it is taxation you do not outlaw a company to exact the tax. To outlaw a man because he does not get registered is in fact to put a terrific penalty upon him.

VISCOUNT HALDANE: Nobody could say if a man did not pay his tax in Ontario that Ontario could not legislate laws outlawing him in the province. SIR JOHN SIMON: I do not say you could not say so.

LORD PARMOOR: You can say if he does not pay a particular tax he is not to carry on business. SIR JOHN SIMON: That is so, but you do outlaw a company if you say the company shall not exist in your province unless it has paid this small tax.

LORD PARMOOR: You treat a company just like an individual. You say: if you carry on business you must do so and so. I do not care whether it is right or wrong, but I do not think you outlaw it. SIR JOHN SIMON: Then I will not use the expression. There is a further way of putting it. The Acts do not call themselves taxing Statutes. That is not at all conclusive, but what, perhaps, is not immaterial is that while these Statutes do not call themselves taxing Statutes, side by side with them there are other Provincial Statutes which do on the face of them, and when you examine their contents you find the pith and substance is that they are imposing direct taxes on certain corporations, such for instance as the Statute in the *Bank of Toronto* v. *Lambe,* and other instances, the Corporation Taxing Act of Manitoba, so that you get that Act on one hand, and the Companies Act of Manitoba on the other, and to say that the Companies Act of Manitoba is an exercise of the pith and substance of the power under section 92, head 2, has at any rate this very curious result, that you find in the same volume of Statutes a Companies Taxing Act which aimed as its end and object the taxing of corporations, and the Statute which endeavors to regulate the trade and commerce of corporations, which it is suggested can be regarded as a case of direct taxation, because one of the incidences if you comply with this attempt to regulate the company's proceedings you will have to pay so many dollars for the registration and you are secure.

LORD CAVE: It depends on what the pith and substance of these Statutes is. Can you tell me what it is? SIR JOHN SIMON: I submit that the pith and substance of these Statutes is to control the exercise of trading and commercial rights which the Dominion has within its own powers conferred upon the Dominion company. The pith and substance is to control the exercise of trading and commercial rights which the Dominion has conferred upon it by section 91 under its powers to regulate trade and commerce upon its Dominion companies.

VISCOUNT HALDANE: That is held in the John Deere Plow Company case. SIR JOHN SIMON: Yes. Therefore it does really come back to nothing more than a comparison.

VISCOUNT HALDANE: Will you look at sub-section 9 of sub-section 2 of the Ontario Statute of 1901? SIR JOHN SIMON: Now, my Lord, it may be you will find it convenient now to have this little analysis which my friend, Mr. Asquith, has prepared. I will give copies of this analysis to my friends too. We have tried to save your Lordships the trouble of a great deal of turning over by getting a number of these points set out in parallel columns. If, before you read the actual context of any particular section, you would like to look at the scheme of this little bundle of pages you will be able to see whether you think it is in a convenient form or not. The first page puts in four different columns the provisions of the legislation as far as the requirements of registration or licensing goes.

VISCOUNT HALDANE: Now just let us see what this is. You take the sections which are relevant to each subject matter? SIR JOHN SIMON: Yes, my Lord, the first column in each case is the section which was dealt with in the John Deere Plow Company's case. Whatever may be the result of this on the argument it is undoubtedly a very convenient form in which to have it.

VISCOUNT HALDANE: You are comparing with British Columbia the other three provinces? SIR JOHN SIMON: Yes, my Lord, I want to see whether or not the differences do really justify a distinction.

VISCOUNT HALDANE: We have not got British Columbia here on this occasion. SIR JOHN SIMON: It is put in here, my Lord, in the first column.

VISCOUNT HALDANE: But British Columbia is not represented here now? SIR JOHN SIMON: No, my Lord, because it cannot argue its case over again.

VISCOUNT HALDANE: It has not come here to say anything further? SIR JOHN SIMON: No, my Lord. Then on the second page my friend, Mr. Asquith,

has set out in the same comparative form the provisions with regard to the penalty for not being registered.

VISCOUNT HALDANE: You say the first one is what? SIR JOHN SIMON: The first page is with regard to the requirement of registration or licensing.

VISCOUNT HALDANE: The first is the requirement? SIR JOHN SIMON: Yes, my Lord, and the second page is the penalty. Then, my Lord, the third one is the disability to sue which is expressed in terms in three of the cases, and is, I venture to think, clearly implied in the fourth, although it is not so expressed. The fourth is: "The disability to hold land." The fifth is: "The refusal to or right to license." They are all there, and I only want your Lordship to see the scheme which happens to run over the second page, because the sections are rather long. Then, lastly, and very important too, I think, comes the "conditions attached to license."

Now, my Lord, from the merely mechanical point of view I think your Lordships will agree that it does save a very great deal of confusion and trouble to have these things set out in these parallel columns.

VISCOUNT HALDANE: Yes, I have only to say I think their Lordships are very much obliged to Mr. Cyril Asquith for his industry in this matter. They do present the case undoubtedly in a most convenient form. SIR JOHN SIMON: The mechanical difficulty of turning from one section to another in the different books is very great. It may very well be that such clarity brings its own consequences upon my head, but my first duty is to get it clearly before your Lordships. Now, if your Lordships will look at that scheme and take first of all the front page, what I would ask your Lordship at once to bear in mind is that our contention is that this proposition in the John Deere Plow Company's case at page 341 applies to all four alike. If these provisions are provisions that compel "an appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province," then I venture to think there is clear authority in your Lordships' considered judgment that they would be inoperative for these purposes.

LORD PARMOOR: In the John Deere Plow Company's case there was a power to refuse to license and, in fact, it had been refused in that case, had it not? SIR JOHN SIMON: I am going to call your Lordship's attention to that distinction. I can assure your Lordship within the limits of my powers I have not sought to put anything out. I had that in my mind. Now will your Lordships look first of all at the front page of this scheme, the section which your Lordship described as one of the relevant sections.

VISCOUNT HALDANE: You have now passed to what struck me as being the most important thing, the comparison of what we have to decide with what happened in the British Columbia case. SIR JOHN SIMON: Yes, my Lord, that is what I am coming to. I think it is the important thing. Now, if you will just take first of all the front page. I am merely venturing to expound this. At the moment I am not arguing. In the British Columbia column you get the words which were held to be inoperative as an enactment: "Every extra-provincial company having gain for its purpose, an object within the scope of this Act, is required to be licensed or registered under this or some former Act, and no company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the province until such extra-provincial company shall have been licensed."

VISCOUNT HALDANE: Well, of course, every company incorporated within the province had not to be registered, but it had to be incorporated, and I suppose there is no difference—at least there is none that has appeared yet between the fees payable by the two companies as against the Dominion company. SIR JOHN SIMON: Is your Lordship speaking of British Columbia?

VISCOUNT HALDANE: Yes. SIR JOHN SIMON: Yes, they were the same in British Columbia.

VISCOUNT HALDANE: Are they the same in all the provinces? MR. WEGENAST: Yes, my Lord, they are the same.

SIR JOHN SIMON: So that would not apparently give ground for a distinction, but my main point, of course, is this: I am not in the least

anxious to hold your Lordships too stringently with any suspicion of pedantry to the actual phrase your Lordship used, but the John Deere Plow Company's judgment is a very important one, and it most plainly does proceed on this basis, and hinges on this point, that the Dominion in the exercise of its power to regulate trade and commerce is able to create that juristic person, that artificial entity which you call a Dominion company, and that, having done so, it has not merely performed the ceremony of baptism over a ghost, but has created a thing.

VISCOUNT HALDANE: We did not agree with the view which the Chief Justice Meredith suggested is the view. We said in the case of the British Columbia Statute which was before us: we have a heap, and we are not going to count its grains. What the position of the grains is is a matter which may have to be investigated at some subsequent proceedings. SIR JOHN SIMON: Using that analogy I say it is impossible to explain the John Deere Plow judgment in view of the fact that your Lordship pointed to a heap, by saying that the whole judgment turns on the question in that heap of one small grain, a grain indeed which is so very much buried under the heap that it is not substantially referred to, namely, the provision that in a given case you cannot register a company if you have the same name. The judgment does not turn on that point. In fact, my Lord, to say that it does is simply to re-write the judgment and to give away three-fourths of it.

VISCOUNT HALDANE: Mr. Nesbitt says the great heap is now a beautifully erected structure. SIR JOHN SIMON: I am saying that one of the offending grains——

MR. WALLACE NESBITT: What your Lordship approved of in that case under Administration of Justice, the getting of proper returns and so on.

VISCOUNT HALDANE: I said for provincial purposes. MR. WALLACE NESBITT: We say there is nothing else in our Statute.

VISCOUNT HALDANE: You say you have studied the John Deere Plow case and have got rid of the amorphous character objected to in that case? MR. WALLACE NESBITT: No, my Lord. If your Lordship will allow me to say so we were educated by your Lordship as to what our powers were, and we varied them. When your Lordship was at the Bar you gave us such wise advice that we knew exactly in Ontario whether we could or could not infringe.

VISCOUNT HALDANE: I have not the slightest recollection of giving that advice, but I remember I did hold your general retainer. MR. WALLACE NESBITT: Yes, my Lord, we say we have always been right in Ontario as to our legislation.

VISCOUNT CAVE: Your Statutes, of course, existed before the John Deere Plow Company's case? MR. WALLACE NESBITT: Yes, my Lord.

VISCOUNT HALDANE: It is Mr. Henn Collins who has purified the conditions of the amorphous heap.

LORD PARMOOR: Do you say, Sir John, after the John Deere Plow case it is not possible to have a provincial regulation compelling licensing or registration of a Dominion company, whatever the terms of the registration or licensing may be? SIR JOHN SIMON: Yes, my Lord. It is not I who says that. I am afraid I have read it so many times, but I wanted to be perfectly clear that I had not made it obscure.

VISCOUNT HALDANE: I want to get this proposition first of all. SIR JOHN SIMON: May I give your Lordship my proposition?

VISCOUNT HALDANE: Yes, do. SIR JOHN SIMON: Provisions in a provincial Act which compel a Dominion company to obtain a license or to be registered as a condition of exercising its powers, or of suing in the Courts, are invalid.

VISCOUNT HALDANE: Now that puts the thing in a very precise and concrete form. SIR JOHN SIMON: I do not wish to obtain any credit for the proposition. As a matter of fact, the proposition is word for word the proposition in your Lordship's judgment on page 341 of the John Deere Plow Company's case.

VISCOUNT HALDANE: Now just let us look at this. SIR JOHN SIMON: It is in the middle of the page.

VISCOUNT HALDANE: I have got at the middle of the page this: "Provinces cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public generally," that is to say for all

purposes—"What it does mean is that the status and the powers of a Dominion company as such cannot be destroyed by provincial legislation." Now is there any other sentence you want to refer us to, Sir John? SIR JOHN SIMON: You have not yet read the sentence I was referring to, my Lord.

VISCOUNT HALDANE: Which is that? SIR JOHN SIMON: It is the first sentence in the next paragraph.

VISCOUNT HALDANE: "It follows from these premises that those provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or suing in the Courts, are inoperative for these purposes." SIR JOHN SIMON: May I just pause there to say that these provisions of the British Columbia Act will be found on the left hand column of the little analysis which is before your Lordship. Those are the provisions.

VISCOUNT HALDANE: Perhaps we might first of all finish the paragraph? SIR JOHN SIMON: By all means, my Lord.

VISCOUNT HALDANE: "The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of the opinion that this question must be answered in the negative." We took that view of the heap? SIR JOHN SIMON: Yes, my Lord, that is the issue, and therefore in order to see whether my friend Mr. Nesbitt's heap contains any of this vicious material I take the heap one by one and I set it out on the left hand column of this analysis, and I invite your Lordships to consider whether there is any correspondingly objectionable matter in these three.

VISCOUNT HALDANE: We did not say you cannot interfere with the powers of the Dominion company at all, but we said you may interfere with it for as you interfere in the same way with other companies, so far as you treat it as one of an aggregate class. SIR JOHN SIMON: I would like to deal with that, my Lord.

VISCOUNT HALDANE: We did not say more than that. SIR JOHN SIMON: I am most unwilling to appear to—I do not know what word to use—to ride too hard a particular sentence in a particular judgment. I do not wish to do that. It would not be fair to do that. I am only anxious to get your Lordships' mind to the argument we are putting. If your Lordships will take the left hand column, first of all, you will see——

VISCOUNT HALDANE: Yes, but there is a question of substance at the root of it. You do not argue that we laid down there that you cannot interfere at all with the powers of a Dominion company. We said you can interfere so far as these powers are the same powers as the powers of the other companies in the Dominion, and the general law which is in substance the same for every kind of company. SIR JOHN SIMON: I will endeavour to put the proposition not too high, and as I really understand it. I am not at all disputing that it is within the competence of the Provincial Legislature to pass legislation which will involve certain burdens being put upon all persons in the province, whether natural or artificial persons. That is quite possible within certain limits, but, with very great respect, the whole kernel of this case depends upon this: Can you, the Provincial Legislature, validly enact that a company which has been given powers to trade in a province by the Dominion shall not exercise those powers? That is the question. You can perfectly well say that you are going to force it to pay a tax, but can it compel them not to do it? That is my proposition.

VISCOUNT HALDANE: Of course not. We have said that, but we have put in the words "as such." SIR JOHN SIMON: I do not shrink from it, my Lord.

VISCOUNT HALDANE: Supposing we say: No company of any sort or kind is to carry on business in the province without paying a tax, and if it does not pay that tax it shall not carry on business at all. SIR JOHN SIMON: I am afraid that is not the case we are dealing with, and your Lordship will find it convenient to see exactly the case we are dealing with by this little table. I should certainly contend a Dominion company which has been brought into being by valid Dominion power,

and which thereby is not merely an umbra, but is a real thing with real powers, and powers which the Dominion alone can confer to be exercised over the whole of the Dominion of Canada—I should most certainly contend that it is not open to the province to take upon itself to say: you may claim, if you like, to be a Dominion company with these Dominion powers—but I veto that power.

VISCOUNT HALDANE: As you put it, of course, but supposing what the province said was: you must pay your tax like every other company, and if you do not pay your tax you shall be stopped. SIR JOHN SIMON: Of course, my Lord, if this was a case of direct taxation—and I have submitted my argument about it—we are out of court.

VISCOUNT HALDANE: Now we have got it really to a concrete issue upon what Mr. Asquith prepared. SIR JOHN SIMON: If anyone is going to say the Companies Act in this or any other country is properly to be regarded as an Act, the pith and substance, the nature and the main purpose of which is to fill up our depleted revenue, then I am wrong, but I do not for one moment believe anyone is going to say such a thing.

VISCOUNT HALDANE: Not all the provinces of course. SIR JOHN SIMON: No, my Lord.

VISCOUNT HALDANE: Supposing the Provincial Legislature says, following out what the noble and learned Lord has said—supposing they say: we require all companies to be registered and to take out a license, do you say they cannot do that? SIR JOHN SIMON: Yes, my Lord, and I say further when the time comes, and it is convenient to look at this document which involves comparing the left hand column with other columns, your Lordships will find I do not need to go as far as that. Your Lordships will find all it is necessary for me to contend for is that strictly according to the John Deere Plow Company's case there are a great many things which the province can do to all companies. Generality is a very important consideration here, but what it cannot do is to say: Now I will put extra-provincial companies in a class—I will call them class 5 or class 8, whatever it may be, and I will proceed in defiance of the right which they have conferred upon them by the Dominion to trade and commerce in the province; I will proceed to say as regards that class of company that at any rate it should not trade unless it first applies for and gets a license or becomes registered.

VISCOUNT HALDANE: Have you put in the words: "as such?" SIR JOHN SIMON: Yes: my Lord. Now will your Lordships see whether "as such" comes into this document?

VISCOUNT HALDANE: Yes, it is really on Mr. Asquith's document this case turns. SIR JOHN SIMON: Yes, my Lord. My learned friend cannot always be on the right side, but at any rate he can expound the contrasts very clearly.

VISCOUNT HALDANE: I am assuming, of course, he has done it with impartiality and accuracy. Of course, what Mr. Nesbitt may say when he comes to deal with it it is another matter. SIR JOHN SIMON: But the whole question is, is it relevant? I am not saying the two things are *literim et verbatim* the same. The second column section 139 of British Columbia contains a provision which your Lordships condemned in the terms which I have already called attention to, and it is of the essence to observe that the ground of your Lordships' condemnation really was that he was condemning extra-provincial companies—may I add "as such" to what is in effect outlawry unless they would either get a license or be registered. That is exactly the thing which at that page your Lordship said was an inoperative provision.

VISCOUNT HALDANE: Yes, standing by itself. SIR JOHN SIMON: Yes, we will see whether it is the same. In the case of the Manitoba the class we are dealing with is class 5, the (V.) your Lordship sees. That is the Dominion company. In the case of Ontario it is class 8.

MR. WALLACE NESBITT: In Manitoba I am told the actual Statute has a provision allowing you to carry on business by travelling, etc., which is not here. SIR JOHN SIMON: You may add anything if you will but for the moment let us take this.

VISCOUNT CAVE: I think they all have that. MR. WALLACE NESBITT: No, my Lord, British Columbia has not and never had.

SIR JOHN SIMON: If my friend thinks it really turns on that distinction we will go into it now.

MR. WALLACE NESBITT: I propose arguing considerably on that.

SIR JOHN SIMON: Then I must deal with that distinction that if you allow the company to have a traveller you are all right, but that if you do not you are none the less wrong. At present I did not think it could turn on such a distinction. Then Ontario is clause 8. Then in Saskatchewan let it be observed, and I wish to do justice to my learned friend's province, it is "any company incorporated under the provisions of this Act or otherwise" and whether that makes a distinction or not, your Lordships will consider. Then there is this to be added, and I want to do it at once so that no one shall say it is not before our minds and before the Court. In the case of Manitoba it will be necessary at some stage—it may be convenient to note it here—that one must look to section 109, section 111 and section 113 of the Manitoba Act. I thought your Lordships ought to note on the first of that document that section 109, 111 and 113 in the case of Manitoba may have a bearing, but at any rate it certainly ought to be regarded. It is desirable to look at all three sections if he looks at any one.

VISCOUNT HALDANE: That is the Companies Act of Manitoba. SIR JOHN SIMON: Yes, my Lord, and therefore will be properly noted at the bottom of the second column of that page. The one which seems to me to be the most important of these three after section 109 is the last two or three lines of section 111. I think your Lordship really must notice this or else it is possible some misapprehension will occur.

MR. WALLACE NESBITT: You must read with that section 110. SIR JOHN SIMON: Very well then I will read section 110 too, but I am most anxious that your Lordships should mark the last two or three lines of section 111 which, while it authorizes the Lieutenant-Governor-in-Council to issue a license to a corporation coming within clause 5, does so "subject, however, to the provisions of this part and to such limitations and conditions as may be specified in the license."

Now, my Lords, the reason why that appears to me to be so important is that if one simply regards section 109—and I will read section 110 in a moment—it might be said: well section 109 says that a corporation coming within class 5 shall receive a license, but the license which it shall receive is a license which is subject to such limitations and conditions as may be specified in the license. Of course the first point which really arises on the terms of the judgment in the John Deere Plow case does not involve this, but in view of the fact that Lord Cave called attention to this the other day, I thought it right to mention that at once. Section 109 says that a corporation coming within class 5 shall obtain a license, subject either, as appears from section 111, "to such limitations and conditions as may be specified in the license." Then section 110 which my learned friend asks me to read says "a corporation coming within class 5"——

MR. WALLACE NESBITT: It is that class which is referred to in section 111.

SIR JOHN SIMON: Section 111 says "A corporation coming within class 5 or 6."

MR. WALLACE NESBITT: Yes.

SIR JOHN SIMON: And I understand though section 111 deals with a corporation coming within class 5 or 6, the last three words of it only apply to 6.

MR. WALLACE NESBITT: Yes, that is what they held in the Supreme Court.

SIR JOHN SIMON: That is a matter of construction which will have to be dealt with, but in my submission it is a very curious one. I do not appreciate how section 111, which says: "a corporation coming within class 5 or 6 may apply to the Lieutenant-Governor-in-Council for a license to carry on its business or part thereof, and exercise its powers or part thereof, in Manitoba, and upon the granting of such license such corporation—which I apprehend means a corporation coming within class 5 of 6—"may thereafter while such license is in force carry on in Manitoba the whole or such parts of its business and exercise in Manitoba the whole or such parts of its powers as may be embraced in the license; subject, however, to the provisions of this part and to such limitations and conditions as may be specified in the license." I really do not understand how such a clause could possibly not apply to corporations coming within class 5.

VISCOUNT HALDANE: It certainly looks so. SIR JOHN SIMON: It seems to me so, my Lord. If the Supreme Court held otherwise, I should respectfully submit that was not an accurate construction of that clause.

VISCOUNT CAVE: I suppose the point is that you find a reference to conditions at the end of section 110, referring to class 6, but you do not find those words at the end of section 109. MR. WALLACE NESBITT: Yes, my Lord.

SIR JOHN SIMON: That is, no doubt, the argument. At any rate I thought it right to call your Lordship's attention to these sections, though they do not really affect the matter. In Ontario your Lordships will remember there is also section 9, sub-section 2, which Lord Cave reminded me of yesterday.

VISCOUNT CAVE: I am really taking now your last page. SIR JOHN SIMON: Yes. It is all down here, but I had noted it on this page because I did not want there to be any delay in observing the qualifications. With regard to the last page your Lordship will see there is no specific provision which corresponds to the provisions I have already called attention to.

Now, my Lords, so much for the inoperative section 139 of the British Columbia Act. Then if your Lordship will turn to the second page, the second page of it can be disposed of at a glance. The second page says that in every one of these four cases the penalty is the same penalty, the penalty of fifty dollars for every day upon which it so carries on business.

VISCOUNT HALDANE: They are all the same apparently. SIR JOHN SIMON: Yes, they are all the same. There is a small difference in the case of Saskatchewan.

VISCOUNT HALDANE: That applies only to provincial companies. SIR JOHN SIMON: Yes, my Lord, only.

VISCOUNT HALDANE: What is the penalty in the case of the British Columbia company and the Manitoba company? Is it the same?

LORD PARMOOR: Yes, it is the same, fifty dollars. SIR JOHN SIMON: I think the penalties are the same. This happens to be not an extra-provincial company. It was so in the British Columbia case.

VISCOUNT HALDANE: The same penalties for provincial companies. SIR JOHN SIMON: Yes, as was also true in the case of British Columbia.

Now the disability to sue is dealt with specifically in British Columbia, Manitoba and Ontario and your Lordships may take it that the sections we have been referring to from the British Columbia Statute are all sections which your Lordship regarded as relevant sections and declared to be inoperative.

MR. WALLACE NESBITT: Not Ontario—that has been amended since. SIR JOHN SIMON: I gather the Ontario Legislature has since altered this. but that has been after this litigation was started, and therefore I am not concerned with it. Then as regards Saskatchewan our searches have not found a clause which expressly says there is a disability to sue, but one can see on common law principles that there obviously something of the sort would arise. Supposing you are prohibited from carrying on business. you would be in a position of an illegal body, like a trade union in this country in the old days.

Then, my Lords, last but one your Lordships will see the heading "Disability to hold land." My learned friend has set out the contrast very conveniently there and I do not desire to spend any time in arguing this beyond reminding your Lordship that Sir Montague Smith's observation, which I think he first made in the case which is reported in 7 Appeal Cases, *The Citizens' Company* v. *Parsons,* is an observation which he, in the following case, said he thought was an illustration of it, but which unfortunately is not, and I do not think there is any question he did rather to some extent revise the illustration in the later decision.

MR. WALLACE NESBITT: Where is that? I do not remember it.

VISCOUNT HALDANE: There is a case Sir John which either you or Mr. Nesbitt can cite to us later which is in my memory, but I cannot place it definitely. It is a case about a Railway Act of the Dominion, and I think it arose in Quebec. MR. WALLACE NESBITT: It is the case of Bonsecourt and the Canadian Pacific Railway.

VISCOUNT HALDANE: Yes. Was not that the case in which it was held provincial powers might operate? MR. WALLACE NESBITT: Yes, my Lord, although it is a railway case.

VISCOUNT HALDANE: However, you will cite that to us when you come to your argument. MR. WALLACE NESBITT: Yes, my Lord.

SIR JOHN SIMON: I thought your Lordship might mean another case which is of some importance in the action, one of those Montreal Street Railway cases. There is one which has got a certain amount of bearing upon a portion of this argument.

VISCOUNT HALDANE: The cases are very fine. I remember a case of an embankment, where you did something to the embankment, and the question arose whether some small work could be done. I am afraid I have forgotten the name of the case now. That was not the Bonsecourt case, was it? SIR JOHN SIMON: No, my Lord, we have had that since in Toronto if my recollection is right, about raising the road.

VISCOUNT HALDANE: Yes. MR. WALLACE NESBITT: But that does not involve any point that is in question here.

SIR JOHN SIMON: No, I do not think it did. Now will your Lordships look for a moment at the page headed " Refusal of or right to license," because this is a point which has been prominently before your Lordships, and I do not wish to shirk it in any way because it may have a great importance. In the case of British Columbia we have set out the section 18(1). Then in the case of Manitoba we have set out section 109.

LORD PARMOOR: In the John Deere Plow Company's case under that section 18 (1), the license or registration as a fact had been refused. SIR JOHN SIMON: Yes, my Lord. It was not really *ratio decidendi.*

LORD PARMOOR: No, I was not saying it was. SIR JOHN SIMON: In section 109 in Manitoba you will see there is a provision that " A corporation coming within class V. shall, upon complying with the provisions of this part and the regulations made hereunder receive a license." In the case of Ontario the provision is " shall," but it is observable that in the case of Ontario as a matter of fact the regulations which are in force at the present time are regulations which do in effect raise the British Columbia point again.

VISCOUNT HALDANE: The judgment you are appealing against was not wholly in Mr. Nesbitt's client's favour. It struck out certain things as inadmissible, and in Chief Justice Meredith's judgment these are set forth. Now, did the Supreme Court go further than Chief Justice Meredith in striking things out? MR. WALLACE NESBITT: That case, my Lord, did not go to the Supreme Court, but comes direct here to your Lordships.

VISCOUNT HALDANE: But some of the cases. MR. WALLACE NESBITT: They did not deal with the same Statute at all.

VISCOUNT HALDANE: But in some of the other cases. Chief Justice Meredith was only dealing with the Ontario Statute. MR. WALLACE NESBITT: Yes, that is so, my Lord.

VISCOUNT HALDANE: And did they in the other Courts of the other provinces strike anything out? MR. WEGENAST: In the Manitoba case the corresponding section was upheld by the Supreme Court.

MR. WALLACE NESBITT: Two Judges dissenting. MR. WEGENAST: Yes.

VISCOUNT HALDANE: But without striking anything out. MR. WEGENAST: Yes, that is right.

VISCOUNT HALDANE: And, therefore, the Supreme Court accepted the striking out of Chief Justice Meredith. MR. WEGENAST: No, they overruled it and restored the passage in effect.

VISCOUNT HALDANE: There is effect of the Supreme Court's judgment that there is nothing in any of the Provincial Statutes which is struck out? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: As they stand there before us. MR. WEGENAST: As they stand they uphold the provincial power to say that the Dominion company cannot sue or be sued.

VISCOUNT HALDANE: It is open to us, of course, to follow the example of Chief Justice Meredith and to say what might go out if we thought fit. MR. WEGENAST: Yes, my Lord.

SIR JOHN SIMON: Yes, that is a question of comparing the views of Chief Justice Meredith, which are now directly before your Lordships' Board, because the Ontario Statute has never been to the Supreme Court, with the views expressed by the Supreme Court in reference to very similar words.

VISCOUNT HALDANE: So far as Ontario is concerned we have a struck-out Statute, of course, modified. SIR JOHN SIMON: Yes, a modified Statute.

VISCOUNT HALDANE: Are you complaining of any of these modifications, Mr. Nesbitt? MR. WALLACE NESBITT: No, my Lord. In principle I would say they were not necessary, but it is there, and there you are.

VISCOUNT CAVE: Where is there in British Columbia any obligation to grant a license. SIR JOHN SIMON: My learned friend, Mr. Wegenast, tells me, and it is what I have suspected that the point is rather a moot point; a class of point which so often arises in the construction of our own Statutes as to whether or not there is something implied though not expressed.

VISCOUNT HALDANE: *Julius* v. *The Bishop of Oxford.* SIR JOHN SIMON: Yes, my Lord.

VISCOUNT HALDANE: There was not even a "may" in British Columbia according to this table. MR. WALLACE NESBITT: What is the point?

SIR JOHN SIMON: The point is what provision was there in the British Columbia Statute?

VISCOUNT HALDANE: You may look at the last page—"The conditions attached to license"—"Any extra-provincial company duly incorporated under the laws of (b) the Dominion duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the Legislature extends, may obtain a license from the Registrar." That seems to cover it. MR. WALLACE NESBITT: Will it inconvenience you here, Sir John, if I may put this to their Lordships?

SIR JOHN SIMON: No.

MR. WALLACE NESBITT: My friend Mr. Lawrence, who was in the British Columbia case, says there is an omission here, no doubt because they had not the then Statute—there is an omission from the actual Statute that was before your Lordships, which he thinks very important, namely, a provision that the Registrar may refuse to issue a license to such extra-provincial company which is authorized, and so on. That is not in this list at all. It is at the end of section 152. I was not in that case that contained the provision giving the Registrar complete discretion to refuse a license on any ground he saw fit, and which we think is important.

VISCOUNT CAVE: That only applies to trust companies, does it not? SIR JOHN SIMON: It is only in regard to trust companies.

MR. WALLACE NESBITT: Is it only in regard to trust companies? MR. GEOFFREY LAWRENCE: Yes.

MR. WALLACE NESBITT: I had not read it, my Lords.

VISCOUNT HALDANE: Therefore that does not matter.

VISCOUNT CAVE: That, however, merely strengthens the inference that "may" means "shall." MR. WALLACE NESBITT: If you are looking at your book, it is said to be like the Ontario reprint, not right up-to-date.

SIR JOHN SIMON: I daresay perhaps Mr. Geoffrey Lawrence and Mr. Asquith will check this. I am not really qualified to help your Lordships about it.

MR. WALLACE NESBITT: Nor am I.

VISCOUNT HALDANE: We can ask Mr. Asquith to do that later. SIR JOHN SIMON: Now, my Lords, what I am going finally to ask your Lordships to do is this. I am more concerned to be quite sure that your Lordships have got the comparison I have tried to make, than anything else, and what I was going finally to submit was this. My submission would be that the principle that lies behind this case really is the well-known principle which your Lordships I think formulated, if I remember rightly, in the Insurance Reference. That is to say that where the Dominion legislation rests substantially on an enumerated item of section 91, then it overbears provincial legislation in the same field which rests on an enumeration in section 92. That proposition I think is correctly cited as an extract from what your Lordships pointed out in the Insurance Reference, which was reported in 1916 Appeal Cases.

VISCOUNT HALDANE: I referred to some authority there, I think, did I not? SIR JOHN SIMON: Yes, the reference, if I may give it now, is in 1916 Appeal Cases, at page 595. It is the case of the *Attorney-General for Canada* v. *Alberta,* what is called the Insurance Reference, and the actual passage is at page 595.

VISCOUNT HALDANE: What case did I refer to there? SIR JOHN SIMON: You gave *Russell* v. *The Queen* as an instance. May I just read this passage, my Lord.

VISCOUNT HALDANE: Yes, one just wants to get at the ratio of the thing, because in the test of *Russell* v. *The Queen*—certainly just before that—the principle was held very largely, and Chief Justice Strong, I think, was its chief exponent, that the Dominion was a paramount Legislature and had the right to say things to which Provincial Legislatures must submit. That view was blown into pieces by Lord Watson's judgment, and although the passage to which you have referred their Lordships as regarding things over which both may legislate—I have always had an uneasy feeling that it would be very difficult to justify once you got the view of the British North America Act that the powers of the two Legislatures were co-ordinate. You must construe it, SIR JOHN SIMON: I am only referring to this because it happens to be one of the later pronouncements.

VISCOUNT HALDANE: I think you will find I had same authority before me. SIR JOHN SIMON: Yes, my Lord. May I read the passage, bearing in mind, if your Lordship will, that the passage comes in a judgment of 1916, and therefore it is long after the discussion.

VISCOUNT HALDANE: I remember being troubled with the point, but that earlier authority— SIR JOHN SIMON: I think your Lordship dealt with it really as now being settled.

VISCOUNT HALDANE: Yes, I think it says something that is binding. What did I say in that case? SIR JOHN SIMON: It is what your Lordship said at page 595 of the Insurance Reference: "It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of section 91 of the British North America Act confers, does not, unless the subject matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the Provincial Legislatures by the enumeration in section 92."

VISCOUNT HALDANE: That is incontestable what you have read, but that is another thing. SIR JOHN SIMON: What I want to submit is that when you get, as we get here, the exercise of common powers, not in virtue of the general authority to make laws for the peace, order and good government of Canada, not because in the absence of a clear and defined distribution of powers the thing falls, as we know it does in Canada, to the central as opposed to the local Legislature, but where you get an exercise of Dominion legislative power in virtue of a specified and enumerated item in section 91, the case for the Dominion is stronger.

VISCOUNT HALDANE: You have got to the proposition. But so far as you have read I have not elicited what you told me. SIR JOHN SIMON: I think I did your Lordship an injustice. I ought to have said this: that your Lordship pointed out that where all that can be relied on is the general authority of the introductory words, that then that may not be sufficient to over-ride the specific authority.

VISCOUNT HALDANE: It never can be sufficient. That is incontestable, and I also said I see that there was one case at least in which the provincial powers did not cover this thing, and that was the case of *Russell* v. *The Queen,* where the subject-matter rather lies outside all of the subject-matters entrusted to the province under section 92. SIR JOHN SIMON: Yes, my Lord.

VISCOUNT HALDANE: There you have the Dominion power. MR. WALLACE NESBITT: It has never arisen since.

VISCOUNT HALDANE: I may have said the other thing, but I am rather relieved to find I did not say it in quite that bold way. SIR JOHN SIMON: I am sorry my Lord; it was really my fault.

VISCOUNT CAVE: It is really implied by the words "subject-matter." SIR JOHN SIMON: I do not wish to do more than to indicate the point.

VISCOUNT HALDANE: That refers to the province. There is only one case. "Unless the subject-matter of legislation falls within some one of the enumerated heads which follow enable the Dominion Parliament to trench on the subject-matters entrusted to the Provincial Legislatures by the enumeration in section 92." I see what you mean. There I have left it. Well, even that may be only construction. It is perfectly plain you have to construe the enumerated heads in section 91, and the enumerated heads in section 92 together. What I wondered was whether I had committed myself to the view which was held at that time. I do not seem to have said that. MR. WALLACE NESBITT: No, my Lord, you have not anywhere that I know of.

SIR JOHN SIMON: I am not attributing the proposition to your Lordship, but I am submitting to the Board's consideration what may, in this case, perhaps be approached a little nearer to the inevitable refinement which we have at some time to be bold about.

VISCOUNT HALDANE: Can it be more than a question of construction? Here I may be running up against authority, but it is surely a distribution by the Imperial Parliament of powers, some to the Dominion and some to the provinces. It is now well settled that these are co-ordinate Legislatures. How can it be said that the Dominion powers prevailed? Must not you construe the two? SIR JOHN SIMON: I think one really must, but I believe myself to be able to give your Lordship a couple of references which might, perhaps, be thought worth attending to in regard to that principle of construction.

VISCOUNT HALDANE: On the question of construction? SIR JOHN SIMON: Yes, my Lord. I do not wish to refer to authorities, because it seems sometimes to carry the argument aside, but it was pointed out in the John Deere Plow Company's case that the words, of course, must receive a limited interpretation as distinguished from the widest interpretation, otherwise you would be cutting away the powers of the province far too much. To give another instance of the same thing, Lord Atkinson, I think it was, said in one of the Montreal Railway Cases, in 1912 Appeal Cases, that if we are to place unlimited interpretation on such words that would seriously encroach on the autonomy of the province. Now, my submission would be, speaking for the Dominion, and recognizing that there must be some limitations, that the limitations really are correctly stated under these two heads—first, the Acts which rest on section 91 (2) the regulation of trade and commerce if they are to be valid must be genuinely regulative, and secondly the Acts that rest on section 91 (2) must be general in effect.

VISCOUNT HALDANE: In the whole of the Dominion. That has been laid down. SIR JOHN SIMON: Your Lordship is very familiar with these authorities, and your Lordship I know has thought a great deal about the subject. If your Lordship will take the first point that the Acts must be genuinely regulative, in order that the exercise of the power to deal with trade and commerce should be limited, the best example, I think, is probably in 1896 Appeal Cases, that is to say the Prohibition case, with reference to the Canadian Temperance Act, where the Canadian Temperance Act was held not to be covered by this sub-section, because it did not regulate, but it sought to prohibit and abolish the drink traffic, and in that case, which is reported in 1896 Appeal Cases, at page 363, the pregnant observation occurs in the judgment of Lord Watson: "A power to regulate nationally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation."

VISCOUNT HALDANE: You will find another decision with regard to that: *The City of Toronto* v. *Virgo,* in which a judgment of Lord Davey's will be found dealing with that point, in which he laid down the principle explicitly that "regulate" does not mean prohibit. SIR JOHN SIMON: I do not think your Lordship need examine the judgment minutely. The proposition would hardly be disputed, but searching as one is bound to do in view of the clear line of authority that this is an enumerated power, and therefore, taking the higher order of validity *vis-a-vis,* the province with a more general power to legislate, yet none the less there is to be a limited rather than an overwhelming scope given to it.

VISCOUNT HALDANE: I was thinking of the last words of section 91: "Any matter coming within any of the four or five classes of subjects enumerated in this

section shall not be deemed to come within the class of matters of a local or private nature comprised in the section of the classes of subject by this Act assigned exclusively to the Legislatures of the provinces." It has been held that the words "of a local or private nature" do not refer merely to (16) of section 92, "generally to matters of merely local or private nature in the provinces," but they refer to what comes in section 92, if my memory serves me right. SIR JOHN SIMON: Yes.

VISCOUNT HALDANE: Yes. That is giving colour to the doctrine that if once you get anything in 91 it is to prevail over 92. SIR JOHN SIMON: Yes, my Lord.

VISCOUNT HALDANE: And I think that is the whole foundation of the principle. SIR JOHN SIMON: That is the first of the two tests, before you can say that the Dominion Legislature which claims to derive its authority from section 91 (2) is good Legislature, I must agree it must satisfy this limiting condition—it must be genuinely regulative.

VISCOUNT HALDANE: Yes, and if it is, nothing in 92 is to interfere with it. SIR JOHN SIMON: Yes, my Lord. There is a second thing which I quite conceive by way of limiting an otherwise overwhelming application of section 91 (2), and that is this. I quite admit, as it seems to me, appearing for the Dominion, it is right to say that there is this further limit; the legislation has got to be general. Take, for example, a well-known case like the *Citizens Insurance Co.* v. *Parsons,* in 7 Appeal Cases, where syour Lordship remembers it was held that the powers of the Dominion under section 91 (2) did not extend to the detailed regulation of the conduct of a particular trade, namely fire insurance. The view was this, and your Lordship will find it if you look at page 113 of 7 Appeal Cases: their Lordships held that the power of the Dominion under section 91 (2) did not include "regulation of trade in matters of purely provincial concern, and it must be general regulation of trade affecting the whole Dominion."

VISCOUNT HALDANE: Yes, I remember the passage well. SIR JOHN SIMON: You will find a similar passage in *Russell* v. *The Queen.* There is a passage at page 842 of 7 Appeal Cases. The conclusion I submit for the consideration of your Lordships' Board will be this: first, the creation of a Dominion company with rights and powers, trading rights all over the Dominion, that is something which is more than the mere bringing into existence of a mere shadow. It is a real thing with real powers which cannot be denied, and while I admit that even when the legislation is passed with these specified and enumerated items like 91 (2), still one must read it with due regard to section 92. The qualifications put upon it really are these. It must be in the nature of an exercise of regulation and it must be in the nature of a general provision. If it satisfies those conditions then nothing in section 92 can affect it, and fundamentally our case is that once it is conceded a Dominion company, by virtue of its Dominion incorporation, is a thing with trading rights and powers in the matter of trade and commerce all over Canada, then it follows that no doubt you may have direct taxation in a province which will tax corporations. I do not dispute it at all. You may have a whole series of controversies which will incidentally affect it, but there is one thing the province cannot do. The province may say: I do not agree that you have got those powers unless you come here and get a license and register.

VISCOUNT HALDANE: One is a general proposition, and I think that is indisputable. SIR JOHN SIMON: Now, here we have this: the present Acts do not fail for lack of generality, falling under section 91 (2). They are not limited to companies which dealt with some particular trade. It is a perfectly general provision. It is not like the *Citizens Insurance Company* v. *Parsons* case, where you have a fire insurance company. They touch on trade and on commerce at all points. This is very much strengthened by the insurance reference———

VISCOUNT HALDANE: Do you propose to continue after lunch, Sir John? SIR JOHN SIMON: If your Lordships will allow me to add just a very few words in the quarter of an hour after you resume that will be quite suitable to me, and that is the extent to which I am afraid I shall be able to offer assistance to your Lordships' Board.

VISCOUNT HALDANE: Very well, we will adjourn now. MR. NESBITT: I cannot help saying that I hope some one will take up the work of the late Mr. Lefroy and continue his book on the Canadian Constitution. I think the last edition of his book is now some years old. MR. WALLACE NESBITT: Yes, my Lord. I may perhaps suggest that to Mr. Cameron, the Registrar of the Supreme Court.

(Adjourned for a short time.)

SIR JOHN SIMON: My Lords, with reference to the contention I last submitted, namely, that the limits to be put on the widest construction of section 91 head 2 is really the limit that must be really a regulative law and a general law. That contention seems to be strongly supported first by a passage in the John Deere Plow case, which I would like to read at page 340, where your Lordship says this. It is the previous page to the page we have several times referred to: "Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Company* v. *Parsons,* on head 2 of section 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head, like the expression 'property and civil rights in the province,' in section 92 receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion, in what they should be permitted to trade. Their Lordships are therefore of opinion that the Parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act and the Interpretation Act. They do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a province, and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the Provincial Legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the province if civil rights were to be read as an expression of unlimited scope. But, as has been pointed out, the expression must be construed consistenly with various powers conferred by sub-sections 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the province cannot legislate as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation."

VISCOUNT HALDANE: I cannot help thinking that this is a very unilluminating passage for the purpose of the concise point in this case. It is all a question of what details we are considering. What does 'as such' cover? We took the view in the John Deere Plow case that the legislation was intended to restrict the status conferred properly by the Dominion, but having said that we did not decide anything more. SIR JOHN SIMON: I am not at the moment arguing that your Lordship has in terms decided this matter. There are references on one side or the other, which it is proper to make.

VISCOUNT HALDANE: That is the crucial passage. SIR JOHN SIMON: The other reference in this connection is to be found in 1916 Appeal Cases in the Insurance Reference at page 597. This is an interesting passage because it refers to the John Deere Plow case: "Where a company is incorporated to carry on the business of insurance throughout Canada and desires to possess rights and powers to that effect, operative apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of *John Deere Plow Company* v. *Wharton.* But if a company seeks only provincial rights and powers, and is content to trust for the extension of these in other provinces to the Government of those provinces, it can at least derive

capacity to accept such rights and powers in other provinces from the province of its incorporation, as has been explained in the case of the Bonanza Company." Therefore, in a nutshell, the view which the Dominion would press upon the Board really is this. I hope this portion of it goes without further argument. Then we come to the dispute in the matter. In the first place the Dominion Legislature in incorporating the company does much more than merely create a juristic entity in the abstract; it does in the language of this last passage confer upon the Dominion company rights and powers which are operative apart from further authority.

VISCOUNT HALDANE: That must be so, otherwise there would be a *lacuna*. SIR JOHN SIMON: Yes.

VISCOUNT HALDANE: The province can only create a company with provincial objects; it can only give it capacity; it can only give it vitality for provincial objects. If Chief Justice Meredith's view was the right one, that there was a mere abstract entity created, it would be a non-existent company. SIR JOHN SIMON: Yes. I practically come up against, what in our view, is the crucial matter. My submission on behalf of the Dominion is that if the Legislature of the province takes the form of saying that the exercise of the powers which the Dominion confers within the boundary of the province shall only be operative if additional authority is required that really is in conflict with the principle of the distribution of the powers.

VISCOUNT HALDANE: Supposing it is, you have to read head 2 of section 91 with limitations. It may regulate trade and commerce to the extent of constituting a company with power extending to the whole Dominion, but consistently only with the exercise of such powers as the Provincial Legislature under section 92 has. SIR JOHN SIMON: Yes, that is the way we should put it. To sum up my argument it would be this. We should say in this case the Dominion companies in virtue of their Dominion corporation got the power and the right to carry on trade and commerce in that part of the country which falls geographically in a particular province, and as it was said in the Insurance Reference they got that without further authority in virtue of that which the Dominion under the exercise of its exclusive powers can give it. That does not mean that such a body is not exposed to the general law which the province can validly make, like the Companies Act of Manitoba or Saskatchewan. If really it could be treated as an Act, the pith and substance, the nature and object of which is nothing more than direct taxation, then the direct taxation of companies, whatever be their origin, is as much within the powers of a province as the direct taxation of an individual.

VISCOUNT HALDANE: The ultimate power of exercising jurisdiction over property and civil rights does not destroy the status.

LORD PARMOOR: Supposing one of the clauses said a direct tax shall be imposed, do you say that if the Act does not deal with the taxation one may not impose taxation directly? SIR JOHN SIMON: No, and so far as the particular incident of the legislation is concerned it is just as true of the British Columbia or any other province—there is no difference at all—unless it is to be presumed *per incuriam* which is quite contrary to the result of the argument that such a thing did occur with great respect involved a view that the John Deere Plow Company legislation was involved. My submission, therefore, comes to this. The province cannot, however ingeniously it framed its legislation, say that Dominion authority to live in the case of a company means to carry on trade and commerce within geographical area, but that is not enough, to allow you to live in our area; before you live in our area there is something else you must do in order to be entitled to be born. That was the point of the observation which I was quoting, without wishing to bind anybody by it, of Lord Moulton.

VISCOUNT HALDANE: You have brought out the principle very lucidly, and really it comes to a question of detail. We have to deal with matters more in detail than in the John Deere Plow Case, and it may well be that when we come to the details we may say on certain points the Statute is objectionable. It is now for Mr. Wegenast to resume his argument, to go into details and show us the conflict and the principle. SIR JOHN SIMON: I am obliged to your Lordship.

VISCOUNT HALDANE: I do not believe that Mr. Nesbitt differs very much from that position. SIR JOHN SIMON: If that is the case your Lordship will be good

enough to relieve me. I submit that I have offered some strong considerations which support the proposition with which I began, and it is the view which the Dominion instructs me to present to the Board as the governing considerations which will determine whether the particular sections are *ultra vires* or *intra vires*. I am very much obliged to the Board for allowing me to address them at this stage.

VISCOUNT HALDANE: I think it is a very convenient course, and I hope Mr. Wegenast has not been unduly interrupted. It will now enable him to take up the principle at this point. SIR JOHN SIMON: I am very much obliged, not only to the Board, but to my learned friend, who has been most conciliatory in allowing me to address your Lordships, and I hope I have not unduly broken the trend of his argument. MR. WEGENAST: Not at all.

VISCOUNT HALDANE: Now, we will hear you, Mr. Wegenast. MR. WEGENAST: My Lords, I think I have read all the judgments of the lower Court which were against me. I desire now to proceed with the other judgments, commencing with those in the Court of Appeal of Manitoba.

VISCOUNT CAVE: I think you have read no judgment of Manitoba. MR. WEGENAST: Except that of Mr. Justice Idington, who includes Manitoba. I desire now to begin at page 19, where the judgment of Mr. Justice Howell begins. That is the Appellate Court. As I have already stated, the case went before the trial Judge; that judgment was without argument, the practical hearing having been had in some previous cases, and the real argument took place before the Court of Appeal. "The defendant is a company incorporated under the Companies Act of Canada, and the plaintiff is a shareholder in that company, and brings this action to test the Constitution of an Act of the Legislature of Manitoba, chapter 35, Revised Statutes of Manitoba, 1913, called also the Companies Act. In referring to these Statutes, I shall hereinafter refer to the former as the Canadian Statute and to the latter as the Manitoba Statute. The case is of the same nature as *The John Deere Plow Co.* v. *Wharton,* 1915, Appeal Cases 343, and the defendant contends that in this case the Manitoba Statute should be disposed of as the British Columbia Statute was in that case. At the outset it seems to me well to consider the methods of taxation under Manitoba's provincial laws. The chief taxation under these laws consists of charges on all real and personal property levied by municipalities, the whole proceeds of which are received by the several municipalities and applied by them for municipal purposes. Occasionally there is legislation by which the municipalities are directed to levy a small charge on the ratepayers and collect and pay over the same to the Provincial Treasury for some special purpose, but this does not often occur, and the sums so paid are inconsiderable. Through a provincial officer, known as the Municipal Commissioner, municipalities are required to levy certain rates to help keep up judicial divisions and the buildings therein, and the funds so received are applied solely for this municipal purpose. For general provincial purposes the province does not levy any rate, nor does it have any general charge upon property. For revenue it depends chiefly upon the Dominion subsidy, but supplements this by moneys received from charges for the incorporation of companies and from charges made against other joint stock companies and from licenses of various kind." May I observe there that we quite admit the charges in the Manitoba Acts, and the Ontarii Acts, and, as far as that is concerned, the Saskatchewan Acts as well are intended to implement the provincial revenues, but by way of incorporation fees, as his Lordship here states; in fact, that is my complaint against them, that they are incorporation fees and royalties for franchise and not taxes. "A considerable revenue is received under chapter 191, Revised Statutes of Manitoba, known as 'the Corporations Taxation Act.' This Act provides for the taxation of banks, insurance companies, street railway companies, express companies, telegraph companies, and various other companies. Under this Act the amount to be paid is fixed in various ways. Banks, for instance, pay $800 if head office is in Manitoba, and various sums for the branches. That Act requires each company to make certain annual returns, giving details of business done, various values of real and personal property held by the company and many other particulars. In case of a bank the only return is evidently the number of branches," that is, the number of branches in the province. It was part of the basis of the tax in the Lambe case, that there was consideration for the number

of branches in the province, and the amount of capital employed in the province. Your Lordships will observe these charges to which we object. The imposition is on the basis of not merely the whole paid-up capital of the company, but of the authority, the amount of capital which the company is authorized to issue, so that it was arguable that it is an indirect attempt to tax property outside the province. "A penalty is imposed for not making annual returns. By chapter 193, Revised Statutes of Manitoba, called the Railway Taxation Act, railway companies are subject to taxation, and they are compelled to make returns annually under penalty. It is to be observed that most of the companies taxed under these two Statutes are companies necessarily incorporated under Dominion laws, and it is not their property situate in the province that is taxed, but it is really a charge against them because of doing business in the province. Each would also be liable to municipal taxation upon their property." Of course, it is in a sense on the property in the province; that is the basis of the taxation, although the taxation is imposed *in personam*, as your Lordship observes, it is based on the extent of the company's business in the province.

VISCOUNT HALDANE: In the case of railways, the railway is in the province, in which case it is a matter for the province. Is the taxation of that on the same footing as the proportion of the Dominion railway that runs through the province, on the mileage of the provincial railway? MR. WEGENAST: I cannot say as to that. I can say that the taxation of Dominion railway companies is based on the mileage and other assets.

VISCOUNT HALDANE: In the province? MR. WEGENAST: In the province, not on the total capital of the property throughout Canada.

LORD PARMOOR: On the mileage run in the province or the actual mileage? MR. WALLACE NESBITT: No; it is the number of miles of railway; they do not get the train mileage.

MR. MOSS: It is the number of miles of track.

MR. WEGENAST: Each would also be liable to municipal taxation upon their property.

VISCOUNT HALDANES A Dominion railway authorized to make its line or run through the province might be a good deal hampered by the taxation of the province. MR. WEGENAST: Yes, my argument would be that if your Lordships had before you an Act purporting to deal with the taxation of railways and you could see through that Act and behind it the intention to favour provincial railways as against Dominion railways———

VISCOUNT HALDANE: If you had that case it might be so. On the other hand it is very alarming to say the Province cannot tax Dominion railways. MR. WEGENAST: That is not argued.

VISCOUNT HALDANE: It comes not very far off. MR. WEGENAST: No, the only qualification I would like to make, and it may be necessary for my case in one aspect, is—it would not be competent to the province to tax a Dominion railway company on the total capital employed throughout Canada, without regard to the amount employed in the province.

VISCOUNT HALDANE: They do not do that. MR. WEGENAST: No.

VISCOUNT HALDANE: You say that they did, but it is not within the law. MR. WEGENAST: Yes, and in the Lambe case there was the qualification; there was consideration for the amount of capital employed in the province and the number of banks. The Act is in the collection before your Lordships, and I will refer to it if your Lordship permits. "The Manitoba Statute the subject-matter of this suit" (etc., etc.). Reading down the words Companies Act, giving the machinery for the incorporation of companies. Added to this Statute, but a part of it, is Part IV. 'Extra-provincial corporations.' Sections 107 and 108 are as follows." It will not be necessary perhaps to read those sections. By section 88 your Lordships will see the interweaving of the Companies Act with the scheme of extra-provincial corporation control—it provides "That fees payable on charters issued by the province shall be fixed by the Lieutenant-Governor-in-Council." Is not that significant of showing, that those fees are fixed by the Lieutenant-Governor-in-Council? It is a very unusual form of tax. They are called in the Order-in-Council "Fees for services." "And as part of this tax the Order-in-Council fixing

these fees is before us, and also the Order-in-Council fixing the fees required under section 126, above referred to. In each case the fees are graduated according to the amount of the capital, and in amount they are identical." What is what we say is significant of the view taken of the sort of legislation that this is. "Provincial companies, therefore, may pay the same fees for incorporation that Canadian companies pay for license," which we say is practically re-incorporation. "The defendant company is by that Order-in-Council required to pay, in order to obtain a license, the sum of $150.00, and under the Statute it must pay annually $10.00, both sums being payable 'to His Majesty for the public uses of Manitoba.'" We do not object to the $10.00 payment at all, that is in connection with the annual return which, while in form seemed objectionable, in substance is not worth quarrelling about. "It is apparent that practically all companies doing business in Manitoba, no matter where or how incorporated, are compelled to pay certain sums into the Treasury of Manitoba for the use of the Province. In some cases it is called a tax, in others a fee for a license. In the John Deere Plow case, Lord Haldane says, at page 342: 'It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by section 92. Thus, notwithstanding that a Dominion company has a capacity to hold land, it cannot refuse to obey the Statutes of the province as to Mortmain (*Colonial Building Association* v. *Attorney-General of Quebec,* 9 Appeal Cases 157, at page 164); or escape the payment of taxes even though these may assume the forms of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe,* 12 Appeal Cases 575).' In *Brewers & Maltsters* v. *Attorney-General,* 1897, Appeal Cases 231, the plaintiff was a Canadian company duly licensed by Canada to manufacture beer. The Ontario Act required the company to take out a license before they could sell in Ontario for consumption there. The Court held that Act *intra vires,* although it provided that no sale could be made until a license was procured. Lord Herschell held that this was direct taxation. It is to be observed that the Ontario Act had many restrictions on and regulated the methods of business of the licensee, as, for instance, requiring the licensee if he sold in bottles to sell by dozens of bottles and of a particular size, and there are many other restrictions on their method of doing business."

VISCOUNT HALDANE: That is very important; it was held by this Board in Brewers & Maltsters case that the Act went far beyond what was necessary for direct taxation, it imposed restrictions on the mode of carrying on the business, and yet, although part of this was conditions attached to the license, Lord Herschell held that did not take it out of direct taxation. MR. WEGENAST: I thought that was all in my favour because that gives the Act a character which brings it, as was pointed out at the close of the judgment, within the genus of item 9 of section 92, shops, saloons, taverns, and so forth.

VISCOUNT HALDANE: But still it interfered with the regulation of trade and commerce, you are not to sell except in so many dozen bottles. MR. WEGENAST: I not only admit it, I urge that the province may regulate the business of a brewer—the way in which he shall prepare his product for sale in the province—for local sales, and your Lordship will perhaps in looking at that Act see that the provisions of the Provincial Act are confined to business within the province and not inter-provincial business.

VISCOUNT HALDANE: When the time comes you will call attention to Lord Herschell's judgment, but as at present advised it looks as if he tolerated a very considerable interference by regulation. MR. WEGENAST: Yes, I would not for my purpose object to that; it is all *qua* Maltster or Brewer.

VISCOUNT HALDANE: Generally applied to Dominion and provincial alike. MR. WEGENAST: Yes, but it is dealing with the company whatever kind of company it was.

MR. WALLACE NESBITT: Only Dominion.

MR. WEGENAST: It does not appear from the report of the case whether it is Dominion or provincial.

MR. WALLACE NESBITT: I think it is only provincial, it aimed at stopping the Dominion coming in.

VISCOUNT HALDANE: We shall have to examine the judgment when the time comes. MR. WEGENAST: May I say briefly, the Act in that case, the Dominion Act, was not an Act dealing with companies, it was an Act particularly dealing from the Dominion standpoint with a license to sell liquor. The argument was, the Dominion legislation in that case dealing with the company *qua* liquor sellers should have the whole field, to exclude provincial regulation directly. That was the sole issue dealing with the company *qua* company.

VISCOUNT HALDANE: Lord Herschell said that was not so.

LORD PARMOOR: The point was raised whether it was direct taxation, and Lord Herschell held it was, and that was governed by the case of Lambe.

VISCOUNT HALDANE: You see as an incident to what he said was fair taxation there is regulation of the number of bottles.

LORD PARMOOR: I think he justified the regulation under the latter part of section 92.

VISCOUNT HALDANE: Still, he treated it as cutting into the regulation of trade and commerce. Afterwards you will read through that judgment. MR. WEGENAST: Yes. "The case of *Fortier* v. *Lambe,* 25 S. C. R. 422, decided that a fee paid for a license by a trader to do business in Montreal was a tax, and was within the legislative powers of the province. In *International* v. *Brown,* 13 Ontario Law Reports 644, it was held that a license fee exacted once for all, and an annual fee payable as in this Act was merely one phase of direct taxation."

VISCOUNT HALDANE: All this shows that the mere introduction of a license does not prevent it being collection of direct taxation. MR. WEGENAST: We do not object to that principle bringing it in the mere form of a license; if it is not in essence a license it does not fit the Act.

LORD PARMOOR: Suppose it is in essence a license, and payment has to be made, why is not it taxation? MR. WEGENAST: If in essence a license then it must fall within item 9 of section 92; if it is in essence a license it must be of the genus of item 9 also; we have two separate items.

VISCOUNT HALDANE: What are the words of section 92 about section 9? MR. WEGENAST: Shops, saloons, taxerns, auctioneer or other licenses.

VISCOUNT HALDANE: You may have a license on everybody who carries on that sort of business. MR. WALLACE NESBITT: In any case the conditions are attached to the license.

MR. WEGENAST: In the Brewers case they said practically they were unable to see what was the genus which would include shop, saloon, tavern and auctioneer licenses, and which would exclude brewers' and distillers' licenses. My submission is it does exclude a license on the corporate capacity of a Dominion company. "It seems to me that the Manitoba Statute was enacted for the purpose of completing the provincial scheme of direct taxation for the general purposes of the province by a general charge or tax on all corporations as in *Bank of Toronto* v. *Lambe,* 12 Appeal Cases 586, Lord Haldane in the language above quoted held that a license to trade, which affects Dominion, as well as other companies, is a tax within the powers of the province. Section 109 declares that absolute right of the Canadian company to a license; section 110, however, does not give such an absolute right to companies not having Canadian charter, thus indicating the absolute right of the former to a license under the Act." At the same time may I observe it indicates the character of the Act. If it was a mere taxation Act, why these distinctions? "It was argued that the right of the local authorities to fix the amount of the license fee put into the provincial authorities the power to prohibit by high fees the company from carrying on business in the province." May I say that was not argued; I was present at the whole of the argument, and that argument was expressly avoided; it had been negatived in the previous case. "That argument was advanced in the Lambe case unsuccessfully. If the fees were made excessive, then perhaps it would thereby become indirect taxation. Section 114 of the Manitoba Statutes requires the applicant for a license to give proof that the charter is in existence, and requires that a person resident in the province be appointed to accept service of process, and it is objected that the province has no power to require this. To my mind

the language used by Lord Haldane in the John Deere case on page 343 justifies all the requirements of that section. The plaintiff has no grievance in this case, for he gets the benefit of sub-section 3, and does not require to produce a power of attorney. Sections 112 and 113 require consideration. They are as follows: '112. A corporation receiving a license under this part may, subject to the limitations and conditions of the license, and subject to the provisions of its own charter, Act of incorporation or other creating instrument, acquire, hold, mortgage, alienate and otherwise dispose of real estate in Manitoba, and any interest therein to the same extent and for the same purposes and subject to the same conditions and limitations as if such corporation had been incorporated under Part I. of this Act, with power to carry on the business and exercise the powers embraced in the license." Of course, there is this observation there that the local company requires the land for local purposes, and, apparently, the Dominion company is to be restricted to the same purposes. In terms this Act would apparently exclude general trading purposes, and it would still be a problem whether this company had the right to hold land for the purpose of carrying on inter-provincial trade; it is an incident of the general scheme of the Act that that arises, but that is rather significant. "113. The powers of any corporation, licensed under the provisions of this part, with respect to acquiring and holding real estate, shall be limited in its license to such annual or actual value as may be deemed proper"—presumably for local purposes; what about the general purposes of the company? Take a company with its head office at Winnipeg, carrying on business throughout Canada, as in the case of these three companies, which are before your Lordships. The Macdonald Company had its head office at Winnipeg; all three companies, the John Deere Plow Company, the Macdonald Company and the Great West Saddlery Company, apparently either of those three are limited to such land as they require for local purposes. It may be argued that when it comes to dealing with the land necessary for general purposes, the province is not the proper jurisdiction, and in the case of the railway company the Dominion might say how much land the company may hold; and in the case of a company carrying on inter-provincial trade, it may be for the Dominion to say what land they may hold for that purpose.

VISCOUNT HALDANE: It is very difficult to say that. MR. WEGENAST: It is difficult in practical application, but in theory not so difficult; apparently here the province has made the distinction.

VISCOUNT HALDANE: There is a great deal the province might have a right to do in connection with the railway company running through its province; it conflicts very much with the convenience of the railway. MR. WEGENAST: It might be open to the province to say a railway company shall not take on the business of an estate company; shall not hold land not required; that sort of thing might be done. I submit it would not be open to the province to put any impediment in the way of a Dominion railway company holding such land as was necessary for its purpose as a railway company, and that is the submission here that it is not competent to the province to put an absolute bar in the way of a Dominion company holding such lands as are necessary for their purpose as a trading company: "Section 67 of the Act, being Part I. referred to in section 112, provides that 'Every company so incorporated, subject to the limitations contained in its letters patent of incorporation, may acquire, hold, alienate, and convey real estate requisite for the carrying on of the business of such company.'" The purpose of the Provincial Act is quite plain, to run the Dominion company into the same mould and give it exactly the same powers as the local company, no more and no less. "Section 29 of the Canadian Act is as follows: 'The company may acquire, hold, mortgage, sell and convey any real estate requisite for the carrying on of the undertaking of the company.' It seems to me that under Section 112 the licensee being a Canadian company gets as wide powers as to real estate as it could get under the Canadian Statute." I have submitted not, my Lord. "It is argued, however, that the terms used in Section 112 'subject to the limitations and conditions of the license,' and the vague language 'shall be limited in its license,' in section 113, and the similar limitations at the end of section 111, hace vested in the provincial authorities power to put such onerous and rigid conditions and restrictions in the licenses as would prevent the company from carrying on business

in the province. It is to be borne in mind that in this case—unlike the John Deere case—there has been no application for a license, and no refusal to grant a license, nad no pretence that the license when granted will contain objectionable conditions or restrictions. At most, the objection is a fear that the licensing authorities, that is, the Lieutenant-Governor-in-Council of Manitoba, may under this Statute exercise their power improperly and exceed the powers granted to the province by section 92 of the British North America Act. This imaginary grievance, like the question of high license fee, above discussed, is disposed of by the Lambe case." Of course it was urged in the argument that the province did not impose any restrictions.

VISCOUNT HALDANE: Was that in the Lambe case? In the Lambe case was there power in the executive to impose a variety of restrictions? MR. WEGENAST: No; the Statute is before your Lordships in this collection and there is nothing whatever about restrictions.

VISCOUNT HALDANE: In the Lambe case there was discretion as to the conditions. MR. WEGENAST: No; he does not mean that I think.

LORD PARMOOR: What they said was you might assume these authorities would exercise their powers reasonably without any specific case being brought before you, that in fact they had done the contrary.

VISCOUNT HALDANE: Was he speaking of the Executive or the Legislature? MR. WALLACE NESBITT: The Legislature.

MR. WEGENAST: Yes, the Legislature.

VISCOUNT HALDANE: That answers the question. MR. WEGENAST: "There is another answer to these objections. The Statute vests in the provincial authorities the power to issue licenses which may be subject to certain conditions and limitations set forth by the authorities. The companies are by the laws of Canada entitled to trade and carry on business in Manitoba, subject to the provincial rights under section 92 of the British North America Act. Under section 110 of the Manitoba Statute the company is absolutely entitled to a license, and it follows that the authorities must issue a license, and they have no power to put in the license any conditions or regulations which are beyond the legislative powers granted to the province by the British North America Act."

VISCOUNT HALDANE: That answers the question I was putting to you. The Executive has power to impose conditions and restrictions, but it would be *ultra vires* if directed to determine corporate capacity; therefore you have a limitation written into the Statute; that is what they say. MR. WEGENAST: That is no more than saying every Statute must be read subject to the British North America Act.

VISCOUNT HALDANE: What is done under that must be read subject to the provisions of the British North America Act, which is a different thing; you must construe the Act as empowering what the British North America Act provides. MR. WEGENAST: As pointed out in several of the judgments, they start with the assumption that the provincial authorities have intended to legislate within their jurisdiction, but he says that they have gone beyond it as a matter of interpretation.

VISCOUNT HALDANE: It is a matter different from that. What is said is that the Legislature has authorized the Lieutenant-Governor when he grants the license to put in conditions at his discretion, but he cannot make conditions inconsistent with the British North America Act. It cannot authorize that. MR. WEGENAST: I have in my hand a specimen of the sort of license issued, if my learned friend raises no objection.

LORD PARMOOR: Is not the general principle this, you have an Act, that if properly put in force by the Executive is *intra vires*, and you do not assume without any particular case being put forward for it that they will act *ultra vires*. MR. WEGENAST: All I can say is we know in this case they have placed restrictions not known before your Lordships.

VISCOUNT HALDANE: That might have been challenged according to this.

LORD PARMOOR: As regards general power you would not make any such assumption, I think. MR. WEGENAST: There is this further, that by attorning to the provincial instructions as asked to do particularly in the Saskatchewan Act, we promise to obey the provincial law which brings us within their ambit, and which

makes ourselves *quoad* the provincial law, provincial companies; at all events we lose such status as the Provincial Act purports to give us by violating the conditions laid down by the provinces. "The British Columbia Statute, the subject of the John Deere case, provided that the Provincial Registrar could refuse a license, and he did refuse such license in that case. In this case there is no power given to refuse the license, and it seems to me the power vested in the provincial authorities to put limitations and conditions in the licenses are only those which can be gathered from section 109 and the following sections of the Manitoba Statute. The Statute does not at all events pretend or assume to give the provincial authorities power to insert in the license limitations and conditions which are beyond the legislave powers of the province in these matters." All I can say is, if one looks at it in this Court, they did do it. They do as a matter of fact restrict the powers of the Dominion companies.

VISCOUNT HALDANE: You see what he says in the next sentence. MR. WALLACE NESBITT: Why do you say that? My instructions are directly the opposite; I do not like to continually interrupt.

MR. WEGENAST: I have in my hand one of the licenses issued by the Manitoba Government.

MR. WALLACE NESBITT: I do not know about Manitoba. I thought you were speaking about Ontario; the Ontario Statute does not pretend to do that.

MR. WEGENAST: No. "If a license issued to a company contained limitations which were beyond the power of the province to impose, the company would be licensed and would not be bound by those limitations. However, to me this all seems wild speculation." That is a matter that I must address myself to. He calls these wild speculations. Well, I cannot point to anything in the record, but I am entitled to say this: His Lordship is not confining himself to the Record when he says: "This is all wild speculation."

LORD PARMOOR: He says he has an Act before him which he can construe so as to be *intra vires*. MR. WEGENAST: That is so: "I assume that the provincial authorities would act lawfully and within their powers, and if an application was made by the defendant company for a license, one would be granted, and that there would be no limitations or conditions in the license which could not by the province be lawfully and properly imposed. I would answer the first four questions in the affirmative. The fifth question can have no bearing on the judgment in this cause. I would not answer the first sentence of this question, because the lessor is not before the Court. As to the second sentence, the Land Titles Act and the various provisions thereof as to such registration were not discussed before us, and I see no necessity to answer this part of the question. The Court being equally divided the appeal is dismissed without costs." Now, of course, I submit to your Lordships that the shareholder in that case was still entitled to a declaration that the company could not hold land if that were so, and that the company were liable to penalties, and was incapable of holding land; it is against me, but I am anxious to have the issue settled, and we do not quarrel with the plaintiffs submitting the case; I join with the respondents in this case in saying that they were entitled to raise the point and to have it decided.

VISCOUNT CAVE: All the Chief Justice says is in British Columbia, the Lieutenant-Governor could refuse a license; there he means he could refuse it on the ground the name was objectionable. MR. WEGENAST: I suppose so.

VISCOUNT CAVE: I do not remember any other power in the British Columbia Statute. MR. WEGENAST: It was a moot point; it was discussed by Sir John Simon; I have since got the Act, and I find that the copy before your Lordship, which is a departmental compilation of 1913, contains a section not in the Act at the time the John Deere Plow case came before your Lordships. That is the section about trust companies. That is section 152; it is in such terms that it is quite remarkable I think. I argued in the John Deere Plow case here, that a Dominion company would be entitled to come before the British Columbia Court and *mandamus* the Registrar to issue a license. Section 152 of the Revised Statutes of British Columbia as they stood at the time the John Deere Plow case was fought was in these terms: "Any extra-provincial company duly incorporated under the laws of"—then it mentions the Dominion—"may obtain a license from the

Registrar authorizing it to carry on business within the province in compliance with the provisions of this Act and on payment of fees."

VISCOUNT CAVE: It says the Registrar could refuse a license and did refuse a license; that must refer to the power to refuse on the ground that the name was objectionable. MR. WEGENAST: Yes, I think so.

VISCOUNT CAVE: Is not there a similar power, having regard to regulations? MR. WEGENAST: I cannot speak as to Manitoba; in Ontario there is a regulation made under the power to make regulations whether valid or not, which obliges the company to satisfy the Registrar as to its name.

VISCOUNT CAVE: I want to follow the reasoning. MR. WEGENAST: It is at the bottom of page 22 that the Chief Justice deals with that point.

VISCOUNT CAVE: Page 23 in the second paragraph he says: "The British Columbia Statute provided that the Provincial Registrar could refuse a license, and he did refuse such license in that case." That I think was on the ground of the name. MR. WEGENAST: That is so.

VISCOUNT CAVE: He says: "In this case there is no power given to refuse the license." Probably that is so. What I wanted was the regulation; I am probably thinking of the Ontario regulation.

VISCOUNT HALDANE: I think it is a formidable point to say that the province could refuse the license to trade merely because the name seemed objectionable. Is not the name part of the Dominion status of the company? MR. WEGENAST: We argued in the John Deere Plow case it was one item of its status. In the Saskatchewan Act you find the other item given dealing with the company's name.

LORD PARMOOR: In the John Deere Plow case you actually had a company to which registration had been refused. MR. WEGENAST: But that fact was not before the Court. All that is said in the judgment is this; it is said the company had been refused a license; it was not before the Court on the record except that the province brought in some correspondence which the company had with the Government. We said we did not need a license; it was not part of our case at all. It might have been open to your Lordships to hold that section 18 of the British Columbia Act which dealt with the use of names was *ultra vires,* but of course your Lordships did not place the judgment on that basis. If that had been your Lordships' view in the John Deere Plow case we should have failed, and your Lordships would have said to the company, yes you must have a license, and you are entitled to go to the Registrar and demand it, you have taken the wrong course in saying you do not need a license; you could have got a *mandamus* against the Registrar; you did need the license; we took the alternative. Now, I will go to the judgment of Mr. Justice Cameron.

VISCOUNT CAVE: Where in Manitoba is the power to make regulations; I know they are referred to in section 109. I want to see how far the power to make regulations extends. I cannot lay my hand on the section. MR. WALLACE NESBITT: It is section 109.

VISCOUNT CAVE: That refers to them; is that the only power to make regulations? MR. WALLACE NESBITT: Ontario has power, it says the Lieutenant-Governor may make regulations.

VISCOUNT CAVE: I want to find it in Manitoba. MR. WALLACE NESBITT: I have it marked that 109 connects with 10 in Ontario; that must be subject to checking; I think you will probably find that is correct.

VISCOUNT CAVE: 109 agrees with 5. I want to find the one that corresponds with 10. Do not trouble with it now, but go on with your argument; we will find it later. MR. MOSS: I do not think, as a matter of fact, there is one.

MR. WEGENAST: Section 88 may be the one; it is mentioned by the Chief Justice as giving power.

VISCOUNT CAVE: That is as to fees. MR. MOSS: At the end of the Act there are certain regulations set out with the fee, and it refers to them as having been made by Order-in-Council. MR. WEGENAST: "In 1877 the first legislation on the subject of extra-territorial companies, as they are now named, was passed by the Legislative Assembly of this province. It will be remembered that Manitoba had entered Confederation only seven years before, that its population was small, that the area of the province at that time was but a fraction of what it now is,

and that then the province was, and for some years after remained, without railway communication. The Act passed in 1877, chapter 15, 40 Vict., was entitled: 'An Act to authorize corporations and other institutions incorporated out of the Province of Manitoba to lend and invest moneys therein.'" That is an Act not dealing with trading companies, I may say generally, and if it is necessary for the purpose of my argument, I am prepared to go into it in detail, that every Act of the Province of Manitoba so far as I know every other province, Saskatchewan imposes this kind of regulation, because the Act of 1900 was disallowed by the Dominion. As his Lordship here mentions, that left one Act which never went into Court, because it was directly disallowed, I cannot for the moment say which, but his Lordship is quite wrong in saying that these Acts had been in force for a period of years. The Act of 1900 was disallowed in the way that I have stated.

VISCOUNT HALDANE: Was that in Sir John Macdonald's time? MR. WEGENAST: Yes.

VISCOUNT HALDANE: He was very much identified with the supremacy of the Dominion. MR. WEGENAST: When I say this, my friend will again come into conflict with me; not only was every act of this character disallowed, but every provincial Act purporting to give a provincial company powers to go outside the province was disallowed regularly up to 1900. The Dominion took the view that regulating companies with other than provincial objects, in the geographical sense, was a matter for the Dominion; rightly or wrongly they took that view; it was an item of that policy to disallow all provincial Acts purporting to put conditions on the exercise of the powers of a Dominion company. No corporation in the way of a Dominion company who entered into the province—if it is of interest to your Lordships I can deal with the matter in detail———

MR. WALLACE NESBITT: Do you happen to have in mind the Canada Permanent Act? Why do you make statements of that kind? MR. WEGENAST: I am prepared to deal with it in detail.

VISCOUNT HALDANE: What is the point in controversy? MR. WALLACE NESBITT: That this Act was disallowed, that purported to give any power———

VISCOUNT HALDANE: Can it matter what they did in 1877? MR. WALLACE NESBITT: Your Lordship will remember the fight the province had to meet for years and years.

VISCOUNT HALDANE: This Bar used to be blocked with Provincial Prime Ministers, who came to vindicate their own rights. MR. WEGENAST: All I want to say for the moment is this, that these Acts which His Lordship has mentioned were Acts which were disallowed by the Dominion, and no Act of this kind was allowed by the Dominion to come into force. The Act of 1909, the Manitoba Act, which is before your Lordships was the first Act applying to trading companies which passed muster under the circumstances I have stated: "It recited that it would greatly tend to assist the progress of public improvements within the province, if facilities were afforded to institutions and corporations incorporated out of the province, for the purpose of lending moneys, to lend within the province, and that it is expedient to confer on such corporations powers to contract and hold lands in the province. Section 1 provides that where any corporation is incorporated under the laws of Great Britain or of the Dominion of Canada for the purpose of investing or lending moneys, it may apply and receive from the Provincial Secretary a license authorizing it to carry on business in the province, to transact a loaning business of any description in the province in its corporate name, except the business of banking, to take and hold mortgages of real estate, and railway and municipal and other bonds, to sell and transfer such mortgages and generally to have the same powers with reference to the premises as any private individual might have, so far as the same might be within the legislative power of the province; with the proviso that such corporations should sell or dispose of lands acquired by foreclosure within five years from the date of such foreclosure. By section 2, a certified copy of the charter was to be filed with a power of attorney to the principal agent in the province, authorizing such agent to accept process in all suits against the company, and declaring service of process upon such agent binding on the corporation. By section 3, process may be served on such agent. By section 4, notice of the license is to be given in the Gazette, and by section 5, the

Provincial Secretary may issue a license on evidence of due incorporation and on receiving the power of attorney. By the same section the fee to be paid is to be fixed by the Lieutenant-Governor-in-Council. In 1880, 53 Vict., c. 19, the Act was amended, extending its operations to companies incorporated by the late Province of Canada, or any of the provinces of the Dominion. It was further provided that any corporation incorporated under the laws of Great Britain or of the Dominion of Canada authorized to carry out or effect any of the purposes or objects to which the legislative authority of the province extends, may obtain a license to carry on its business in the province in compliance with the provisions of the Act of 40 Vict., c. 15. In the Consolidated Statutes of 1880, the above legislation was embodied in chapter 30. In 1883 the above Consolidated Act was repealed and another Act, more extensive in its scope, was passed. This, with amending Acts, is to be found in the Revised Statutes of 1892, chapter 24. There was subsequent legislation on the subject which was embodied in the Revised Statutes of 1902, chapter 28, which was repealed in 1909, 9 Edw. VII., chapter 10, and 'An Act respecting Extra-Territorial Corporations' was passed, which, with the subsequent amendments, is to be found in the Revised Statutes of Manitoba as Part IV. of chapter 35, and is now before us. The defendant company is incorporated under the Companies Act of Canada, R. S. C., c. 79, with its head office at Winnipeg, and is not licensed under Part IV. The action is brought to test the validity of the relevant sections of Part IV., and certain questions are submitted for the opinion of the Court. On the argument before us, counsel for the defendant corporation, in seeking to impeach the validity of provisions of Part IV., relating to Dominion corporations, directed attention more particularly to sections 108, 109, 118, 119, 122 and 123 of the Act as being an invalid exercise of the powers of the Legislature in respect of a company incorporated under Dominion authority. He rested his case mainly upon the decision of the Judicial Committee in the Privy Council in the *John Deere Plow Co.* v. *Wharton,* 1915, A. C. 33, a case which arose under the provisions of the 'Companies Act' of British Columbia, R. S. B. C., c. 39. It was argued that the provisions of that Act, which formed the basis of the judgment in that case are practically identical with those of the Manitoba Act called in question here. In the case of a Statute such as that before us, the presumption is in favour of its validity, particularly when it has been in force in this province, in varying forms, for forty years. It has been generally assumed that legislation was justified by the decision in *Citizens Insurance Company* v. *Parsons,* 7 A. C. 96, and the decisions following that authority. Since that decision there has been no case decided in which provincial legislation regulating commercial transactions and particular trades has been successfuly attacked until the recent decision in *John Deere Plow Co.* v. *Wharton.*" That rather suggests the basis on which he puts the case; he puts it on the basis of the *Citizens Insurance Company* v. *Parsons,* and the default of the province to attack the power of the province to regulate commercial transactions on a ground which I think is not possible to the province. "It is, I think, clear that the invalidity of all or any of those sections, if so declared, would not affect the remaining sections of Part IV. of the Act. In the John Deere Plow Co. case certain sections only of the British Columbia Act were found inoperative." I ought to say that his Lordship is not quoting my argument in that case quite as I tried to put it. What I said was that those sections were all or part of a scheme, and I referred to them principally for the purpose of demonstrating that the Act was a Companies Act, and that the legislation was company legislation. While we do object to the application of the particular section, our main argument is always that these sections show the Act to have a pith and substance, the very nature and character of which is inconsistent with a Dominion status. Under section 109 a Dominion company, such as the defendant company in this case, shall upon compliance with the Act, secure a license to carry on its business and exercise its powers in Manitoba. Under section 110 an extra-provincial corporation, other than a Dominion company, may, upon compliance with the Act, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers as may be embraced in the license; subject, however, to such limitations and conditions as may be specified therein. Section 111 is as follows." Perhaps it is not necessary to read that section, because it has already been before your Lord-

ships. "That is, as I read the Statute, a corporation of either of the two classes may apply for and receive a license to do part of its business in the province, and may thereupon carry on that part of its business, but in the case of a corporation within class VI., subject to such further limitations and conditions as may be imposed in the license under section 110. The similarity in the expression in the two sections 110 and 111 'subject to such limitations and conditions as may be specified' in such license, lends strength to this interpretation. There is evidently an intention not to appear to encroach upon the Dominion jurisdiction, as is seen in the use of the word 'shall' in section 108 instead of 'may' as in section 109, and as appears in section 112, sub-section (3), and elsewhere in the Act."

Viscount Cave: He has the wrong words; it should be "shall" in section 109, and "may" in section 110. Mr. Wegenast: I understand that is correct, my Lord. "Moreover, I think we should in cases of doubtful construction, when the validity of a Statute is in question, be slow to adopt that construction which might undermine the Act, and which presumably the Legislature could not possibly have intended. The result is that, as I look at these sections, a corporation created by or under the authority of an Act of the Dominion of Canada and authorized to carry on business in Manitoba, cannot have its license restricted so that it can only carry on such parts of its business or exercise such parts of its powers in Manitoba as may be specified therein. But even if a power in the Lieutenant-Governor-in-Council or in the Provincial Secretary to restrict the powers of a Dominion company can be drawn from the wording of this section, it must surely be clear that the Legislature could grant no greater power than it itself had." That is a point I have made, that all the Act purports to do is to give the Dominion company such powers as a provincial company would have. "It must have contemplated that such a power would be exercised reasonably and subject to the provisions of section 92 of the British North America Act, precisely as if that section had been set forth in its very words as a proviso to this section. In *John Deere Plow Co.* v. *Wharton,* the appellants had applied for a license, and their application had been refused on the ground that there was another company of the same name on the register, in which case section 18 of the Act (as amended by section 6 of chapter 3 of the British Columbia Statutes for 1912) prohibits the grant of a license. The effect of the amendment is to give the Registrar power to refuse an application by a corporation the name of which is identical with that of another already incorporated, licensed, or registered, or so nearly resembling that other as might in his opinion be calculated to deceive 'or by a name of which the Registrar shall for any other reason disapprove.'" That section 118 was amended after the bringing of the John Deere Plow case. The more stringent part of the section was not in force when the John Deere Plow case was brought.

Mr. Geoffrey Lawrence: My friend is in error; I have a Consolidation Statute of the 4th of March, 1913.

Viscount Haldane: Was that before this case was brought on? Mr. Geoffrey Lawrence: It was in force at the time of the John Deere Plow case.

Mr. Wegenast: No, not the 1913 Consolidation. The John Deere Plow case was raised in 1911. When it came before your Lordships we had here a Consolidation including an amendment after the John Deere Plow case was brought, and while that was fully recognized and discussed before your Lordships, the stringent provisions of the amendment were not, I think, considered by your Lordship as bearing on the earlier intent of the Act as shewing the sort of thing that might be done if this sort of legislation were valid, but it was not so in that case. I had forgotten that, but it comes back to me on reading this judgment.

Lord Parmoor: The decision of the Board in the John Deere Plow case states in terms the Statutes on which the decision was given, and the fact that the license was refused, and it could be refused, that is the main question. Whatever the result of it may be I do not know. Mr. Wegenast: The Judge said it was said that a license had been refused, but I do not think there is any reference to the power in section 18 to refuse a license, the power did not come into play until after the John Deere Plow case had been launched.

Mr. Geoffrey Lawrence: I have the Record here. The writ was on the

16th May, 1913, and the Consolidation on the 4th March, 1913. It contained this provision in section 18.

LORD PARMOOR: They set out in section 137 of the John Deere Plow case the very words: "The Registrar may refuse a license for any other reason."

VISCOUNT CAVE: There was an amendment made in 1912.

VISCOUNT HALDANE: It was a general discretion to refuse a license. That was one of the things we proceeded on. MR. WEGENAST: I have before me the Act as it was when the John Deere Plow action was brought, the Statute as it stood in 1911, and it contains that provision.

MR. WALLACE NESBITT: The writ was issued on the 4th March, 1913.

MR. WEGENAST: I see by the Consolidation in my hand the Act was amended in 1913, before chapter 10.

VISCOUNT CAVE: Also in 1912. Mr. Justice Cameron says this amendment was made in 1912; he says that at page 26, line 28. MR. WEGENAST: I think perhaps I was wrong; I was thinking of *John Deere Plow* v. *Agnew*, the other John Deere Plow action, which went only as far as the Supreme Court of Canada, which was brought in 1911: "The effect of the amendment is to give the Registrar power to refuse an application by a corporation, the name of which is identical with that of another already incorporated, licensed, or registered, or so nearly resembling that other as might in his opinion be calculated to deceive 'or by a name of which the Registrar shall for any other reason disapprove.' Lord Haldane in his judgment summarises the provisions of the British Columbia Act at page 335. He refers to the provisions prohibiting companies from taking proceedings in Courts in respect of contracts unless licensed under the Act, and also to the provisions referred to in section 18, above. 'The question,' he says, 'which has to be determined is whether the legislation of the province which imposed these prohibitions was valid under the British North America Act.'" That was the one dealing with the names.

MR. WALLACE NESBITT: Giving discretion to the Registrar.

MR. WEGENAST: "It is of importance to note that we have in our Act nothing corresponding to or resembling section 18 of the British Columbia Act. On the contrary, our section 109, applying to the corporation before us, says that it 'shall' receive a license upon complying with the formalities prescribed by the Act."

VISCOUNT CAVE: Is that the regulation again? Perhaps it is, because there is no power to make regulations. This Judge twice leaves the regulations out of account, I dare say correctly. I cannot find any power to make regulations in the Manitoba Act. MR. MOSS: I think your Lordship is quite correct.

MR. WALLACE NESBITT: I do not believe there are. I have the section noted as against 110 that that is the only one that corresponds in Manitoba.

VISCOUNT CAVE: It assumes powers, it does not give them. MR. WALLACE NESBITT: Apparently that is so. That is the only note I have.

MR. WEGENAST: "It does seem to me that Lord Haldane considered the two prohibitions he enumerated at page 335 together, that is, the prohibition on the corporation under section 168, against taking proceedings in the Courts if unlicensed, and the prohibition imposed under section 18. The legislation imposing these two conditions he holds inoperative. In the case before him the refusal of the license was the important fact, and it was upon this refusal that section 168 applied. Had there been no right or authority to refuse, the disability under section 168 would not have arisen. In fact, therefore, the crucial point of the case was section 18, and as we have no such provision the John Deere Plow case can, in that important respect, be distinguished from that before us. Had the British Columbia Act contained, instead of section 18, a clause similar to our 109 and 111, it is conceivable that the decision might have been different. It is necessary to consider other matters of distinction between the British Columbia Statute and our own. Sections 102 to 110 of the British Columbia Act are made applicable by section 150 to extra-provincial corporations, including Dominion companies. These are intricate provisions relating to mortgages and charges, the registration of the same, etc., and are not to be found in our legislation. These sections 102 to 110 are not referred to in the judgment, but were discussed on the argument and, as in the case of section 18, already mentioned, they go far to impose on the British Columbia

Statute as it relates to Dominion companies the character of an Act of re-incorporation rather than that of an Act requiring a license and the payment of a tax therefor. Our attention was also directed to other distinctions between the sections of the British Columbia Act and our own. Section 167 of the British Columbia Act imposed a penalty on any extra-territorial corporation for carrying on in the province 'any part of the business' which, it is said, conflicts with sections 29 and 30 of the Dominion Companies Act. In the corresponding section of the Manitoba Act (section 122), the penalty is imposed for violations of section 118, which is restricted to carrying on business within Manitoba, thus being confined to purely provincial transactions within the decision of the *Attorney-General* v. *Manitoba License Holders,* 1902, A. C. 73. Similar observations can be made as to sections 170 and 168 of the British Columbia Act." I cannot see what his Lordship means by that. "It is pointed out, however, that Mr. Justice Duff, in *John Deere Plow Company* v. *Agnew,* 48 S. C. R. at page 232, interprets the phrase 'carrying on business' as it occurs in the British Columbia section 166 (now 167), as appearing to indicate such conduct on the part of the company as would come under the disabilities unless it had a fixed place of business within the province. This expression of opinion was not, as Mr. Justice Duff observes, necessary to the decision." That is the explanation of the exclusion of those provisions from the sketch prepared by Mr. Asquith. While there is no express provision in the Act of Manitoba, Ontario and Saskatchewan relieving the company from license if it carries on business only through a resident traveller or by correspondence, corresponding provisions were let into the British Columbia Act by Mr. Justice Duff in this decision, so that we take it they stand on a parity in that respect: "This expression of opinion was not, as Mr. Justice Duff observes, necessary to the decision. It is at least obvious that the provisions of the British Columbia Act are wider and less guarded than those in the Manitoba Statute. Apparently section 141 of the British Columbia Act assumes to give to a Dominion company the power to hold lands upon the Act being complied with. Whereas the Manitoba sections, 119, 112 and 113, expressly recognize the right of Dominion companies to hold lands. This illustrates the different view-point from which the two Legislatures approached and dealt with the subject. Section 152 of the British Columbia Act provides that an extra-provincial company may obtain a license and thereupon, subject to its charter, shall have the same powers and privileges as if incorporated under the British Columbia Act. On the other hand, section 109 of the Manitoba Act provides that a Dominion company, upon compliance with the Act, 'shall receive a license to carry on its business and exercise its powers in Manitoba,' thus again dealing with the subject from the point of view of recognition and not re-incorporation. There are provisions in the Manitoba Act not to be found in that of British Columbia, which are material. I refer to section 112, sub-sections 2 and 3, and section 114, sub-section 3, and sections 117 and 118. These provisions clearly show an intention on the part of the Legislature to refrain from impairing the powers of a Dominion corporation except where necessary for the purposes which the Act in this part has in view." I agree with that; I read these purposes not being taxation for the purpose of this Act, that is to say, recognition having passed, these provisions are ancillary, but not properly ancillary, to any view of taxation. "In view of the foregoing considerations, I think the distinction between the sections of the Manitoba Act and those of the British Columbia Act to which reference has been made are sufficiently marked to render the decision of the Privy Council in the John Deere Plow Company case inapplicable to the case before us. It seems to me that the view taken in that case was that the British Columbia Act, in effect, compelled a Dominion company to re-incorporate under the provincial Statute. As is shown by a perusal of the argument much stress was laid throughout on the provision in section 18 of the British Columbia Act vesting in the Registrar the power to decline to license and the power to change the corporate name. It was evidently a strong factor with their Lordships in determining the true scope and object of the provisions of the Act there in question, and in arriving at the conclusion that by them the province did 'interfere with the status and corporate capacity of a Dominion company.' The prohibition imposed on a corporation forbidding it to carry on business without a

license under section 118 and the other sections prescribing penalties, looked at in the light of sub-section 15 of section 92, of the British North America Act, involves the test to be applied to a provincial law imposing punishment or penalty. 'The proper way' . . . is to lay out of view for the moment the penalty, and see whether the principal subject enacted is competent.'" That is in a case which is regarded as an authority in Canada, *Regina* v. *Wason*; we agree with that. "The nature of the punishment to be inflicted has no bearing upon the question of constitutional validity." That is a quotation from Mr. Justice Clement. May I remark apropos of what your Lordship said, that I think Mr. Clement has taken up the work left off by Mr. Lefroy and continued it. It is Mr. Justice Clement of British Columbia. There is a volume which came out afterwards.

VISCOUNT HALDANE: A separate volume? MR. WEGENAST: A second edition of his former book, a very valuable book on the Canadian Constitution: "It cannot be argued that the thing prohibited is brought within the range of criminal law merely because of the high nature of the punishment that may be inflicted on the offender." We did not argue that. That is a quotation from Mr. Justice Osler. "Of course the imposition of penalties means little. Both Legislatures may impose penalties. And I cannot see that it would make any difference whether the provincial legislation is a subject within section 92 of the British North America Act in imposing a penalty for its enforcement, apparently invades the jurisdiction of the Dominion Parliament in respect of sub-section (27) of section 91 'the Criminal Law,' or of any other sub-section, such as (2) 'the regulation of trade and commerce.'" There, of course, his Lordship is treading on very dangerous ground. "If such penal legislation is imposed upon the breach of a law which in its true intent and meaning is within the jurisdiction of the province to enact ,it cannot affect the validity of the enactment itself. It is well recognized that provincial legislation, particularly under sub-section 16 of section 92, 'may consist of prohibitive enactments merely, and that this of itself affords no test as to the validity of the enactment.' It has been held that the simple imposition of a penalty upon the doing of an act is in legal effect a prohibition without express words. Now, that is, of course, an authority in favour of our contention under the Saskatchewan Act. That is one of the lines of the case. "Upon the subject to the positive jurisdiction of the province to enact the sections in question, I quote the following from Lord Haldane's judgment in the John Deere Plow Co. case, pages 342-343."

VISCOUNT HALDANE: We have read this. MR. WEGENAST: Yes. Then lower down: "I understand the above statement as plainly not intended to be exhaustive, but as illustrative of the proposition that enactments under section 92 may and can control Dominion corporations in their provincial operations." That we say is not *qua* corporations, they may control *qua* local title, *qua* any proper item of provincial jurisdiction, but not *qua* their corporate capacity. "The above observations are directly applicable to the sections here challenged to the extent that they are of the nature of the Mortmain laws, that they require, as a means of revenue, a license to do business in the province, and that they are an exercise of the powers of the province relating to property and civil rights. I confess I am not altogether clear as to the meaning of the references in Lord Haldane's judgment to the necessity for 'general' legislation under section 92, when he says, for instance, at page 341: 'This does not mean that these powers (*i.e.* of a Dominion company), can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally.'"

VISCOUNT HALDANE: He has not quite understood it. I was referring to this, that the legislation must be directed to its Dominion status as such; it may be directed as against people generally. MR. WEGENAST: He has not grasped it at all. The question of the generality arises in half a dozen different places in your Lordship's judgment in the John Deere Plow case. "And later on the same page, 'The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice.' The language of Lord Selborne in *L'Union St. Jacques* v. *Belisle*, L. R. P. C. 31 (1875), would seem to indicate that under section 91 special legislation by the Dominion Parliament is prohibited."

VISCOUNT HALDANE: I do not know what he is referring to I am sure. I have forgotten what was decided in *L'Union St. Jacques* v. *Belisle,* but it does not matter. MR. WEGENAST: I do not know for the moment. But such legislation has been repeatedly recognized. I suppose what he means is the question whether the Dominion can pass special Acts of Parliament, or whether all their laws must be general.

VISCOUNT HALDANE: Of course, they can. MR. WEGENAST: "In cases under section 92, as under section 91, the power is a plenary power of sovereign legislation in relation to all matters coming within the classes of subjects therein enumerated, as the Act expressly states. The power is not to legislate on each class as a whole (though that is necessarily implied), but on any matter, great or small, falling within the class." That is a quotation from Clement. "This statement accords with the general view of the powers of the respective Legislatures. I take it, therefore, that the generality referred to above is intended to relate rather to the subject of the legislation than to its object or its application, and that it means that the legislation questioned is to be examined from this point of view together and determine its true scope and object, its 'pith and substance' in order to determine whether it comes properly within section 92. In reference to this branch of the subject it is to be noted that the fees payable for a license by extra-territorial companies and those payable by provincial companies on incorporation are identical; that companies of all classes are required to make returns; that letters patent of incorporation are subject to revocation as are licenses to extra-territorial corporations; that, as need hardly be pointed out, a provincial corporation cannot hold lands, nor can it carry on business, prior to its incorporation; that letters patent may be restricted in any manner that may seem desirable to the Lieutenant-Governor-in-Council, and that the holding of real estate by a provincial corporation is subject to the limitations of its letters patent under section 67, as a licensed corporation is authorized to hold subject to the limitations in its license under section 113.' All of which is of the essence of our complaint. We are charged the same fees as the local company. We say that is significant. I wish to refer particularly to the judgment in *Colonial Building Association* v. *Attorney-General,* 9 Appeal Cases 166: 'What the Act of incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business which are defined within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of incorporation gives it capacity to do so." That, of course, as Sir John Simon has stated, was qualified in the later judgment. Then there is a reference to the Brewers and Maltsters case. "We must keep before us the provisions of the Ontario Act there in question, requiring that every brewer, duly licensed by the Government of Canada under the Inland Revenue Acts, shall first obtain a license under the Act, etc., under the provisions of the Inland Revenue Act then in force, to appreciate the importance and relevancy of this decision. It was held that the tax or fee demanded for the license was a direct tax and that the legislation was *intra vires* of the province, though it imposed a prohibition on a Dominion licensee. Lord Herschell expressed the opinion that such a license came within sub-section 9 of section 92, and refused to consider that rule of construction *ejusdem generis* applied to that sub-section, and that there was no genus which would include 'shop, saloon, tavern and auctioneer' license and which would exclude brewers' and distillers' license." Of course, we differ from that, he said, the very opposite we say. He did not say that the *ejusdem generis* rule did not apply, but he could not say what genus would include shop, saloon and auctioneer license, and not included that.

VISCOUNT HALDANE: And excluded the other. MR. WEGENAST: "And that there was no genus which would include 'shop, saloon, tavern and auctioneer' license and which would exlude brewers' and distillers' license."

VISCOUNT HALDANE: Were the words "other licenses" there? MR. WEGENAST: "Shop, saloon, tavern, auctioneers and other licenses." The question was

whether the *ejusdem generis* rule would come in. They applied the *ejusdem generis* rule by saying that the genus applied.

VISCOUNT HALDANE: They read "other" probably generally; they said there is no principle which can cut it down between an auctioneer and a shop; there is no more analogy between that than between an auctioneer and a brewer, or a shopkeeper. MR. WEGENAST: Yes; that is not saying it would include any kind of license.

MR. WALLACE NESBITT: I think he did.

VISCOUNT HALDANE: I think he meant by the rule of *ejusdem generis* the cutting down construction. MR. WEGENAST: He said no doubt the rule does apply to cut down the general words.

VISCOUNT HALDANE: It is very well known what the rule is. There was no class of subject to limit the general words. MR. WEGENAST: Where you find an Act saying "gold, silver and other metals," it does not include iron, as was held in one case. "I refer also to the remarks of Mr. Justice Duff in the Companies case, 48 S. C. R. pages 421-2, which still stand as modified by the decision in the John Deere Plow case, and I think are quite applicable to the provisions of the Act before us. In my humble judgment the provisions of the Act which are controverted in this action should be upheld as being provincial legislation enacted under section 92 of the British North America Act with respect to licenses in order to the raising of revenue by direct taxation (sections 108, 109, 111, 112, 113, 114, and 126); as legislation dealing with property and civil rights, and particularly from the point of view of Mortmain laws (sections 112, 113 and 119); as legislation dealing with the administration of justice in providing for the appointment of an agent, service or process, etc. (section 114), but it is to be noted this section does not apply to the defendant company); and in providing for the making of returns (section 120); as legislation prescribing penalties to enforce these provisions (sections 118, 119, 122, 123, 124 and 125), and generally, as legislation affecting property and civil rights and dealing with matters of a merely local or private nature in the province."

VISCOUNT HALDANE: He agrees with the Chief Justice. MR. WEGENAST: Yes. "I would answer the questions set forth in the stated case in the manner in which they are answered by the Chief Justice in his judgment." Now comes the judgment of Mr. Justice Perdue.

VISCOUNT HALDANE: Need you read that; have not we had that? MR. WEGENAST: I am anxious to read that, I am trying to come to that all the time.

VISCOUNT HALDANE: Very well. MR. WEGENAST: "The question involved in this appeal is whether the Legislature of Manitoba had power to enact Part IV. of 'The Companies Act,' Revised Statutes of Manitoba, 1913, c. 35, being the part relating to extra-provincial corporations, in so far as the defendant company is affected. The defendant is a company incorporated by letters patent under the Great Seal of Canada pursuant to the authority of the Companies Act, being chapter 119 of the Revised Statutes of Canada, 1886 (now chapter 79 of the Revised Statutes of Canada, 1906), with all the rights and powers given by that Act. The chief place of business of the company is stated in the letters patent to be, and it is in fact, at the City of Winnipeg in the Province of Manitoba. The letters patent authorize the company to carry on throughout Canada a general wholesale and retail leather, harness, saddlery, boot and shoe, trunk and valise business, including manufacturing, buying, selling and trading in such goods and the materials used in them, with power to acquire, purchase, lease, sell, build, erect or construct buildings, factories, etc., for the business of the company. The company carries on business in the Provinces of Manitoba, Saskatchewan and Alberta, and has offices or depots at Regina, Calgary and Edmonton. The company is not licensed as required by Part IV. of the Companies Act of Manitoba. For the purpose of its undertaking the company occupies land in the City of Winnipeg under a lease. This action was brought by the plaintiff, who is a shareholder of the company, to restrain the company from carrying on business until it shall have obtained a license under the Companies Act of Manitoba. He claims that he, as a shareholder, is in danger of suffering loss by reason of the penalties and forfeitures to which the company may be subjected through carrying on business in Manitoba while unlicensed. Unless

the present case can be distinguished from the one considered in *John Deere Plow Co.* v. *Wharton* (1915), Appeal Cases 330, the decision of the Privy Council in the last mentioned case will apply, and the portions of the Provincial Statute to which objection is taken must be declared to be *ultra vires*. It is claimed on behalf of the defendant that Part IV. of the Manitoba Companies Act is not distinguishable in principle from the legislation which was in question in the John Deere Plow case. The enactments which were in question in that decision were contained in Part VI. of the British Columbia Companies Act. In the Manitoba Companies Act, Part IV., the expression 'corporation' means a company, institution or corporation created otherwise than by or under an Act of the Legislature of Manitoba (section 106). Corporations created by or under the authority of an Act of the Parliament of Canada, and authorized to carry on business in Manitoba, referred to as Class V., are required to take out a license (section 108). To this there are certain exceptions, but these do not include the defendant. Class VI. includes corporations not coming within the preceding five classes. A corporation coming within the class to which the defendant belongs shall, upon complying with the provisions of Part IV. and the regulations made thereunder and paying the fees required, receive a license to carry on its business and exercise its powers in Manitoba (section 109). A corporation coming within the class to which the defendant belongs or within Class VI. 'may upon complying with the provisions of this part (Part IV.), and the regulations made hereunder, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Manitoba as may be embraced in the license; subject, however, to such limitations and conditions as may be specified therein.'" See section 111. "A corporation receiving a license may, subject to the limitations and conditions of the license and of its own charter, acquire, hold and dispose of real estate in Manitoba (section 112); but it shall not be capable of acquiring or disposing of real estate unless it has been licensed (section 119). No corporation coming within the class which includes the defendant shall carry on any of its business in Manitoba unless a license has been granted to it, and is in force, and no agent of the corporation may carry on its business in Manitoba until a license has been obtained; exception is made in regard to buying or selling by travellers or correspondence, where the corporation has no resident agent or place of business in Manitoba (section 118). If such a corporation carries on business in Manitoba without a license it shall not be capable of maintaining any action, suit or proceeding in any Court in Manitoba in respect of any contract made in whole or in part in Manitoba (section 122). If its agent carries on any of the business of such corporation in Manitoba while it is unlicensed he shall be liable to a penalty (section 123). Upon comparing the above provisions with those of the British Columbia Act summarized as relevant by Lord Haldane on pages 336-337 of the Report of the John Deere Company case, we find the following differences: "Then perhaps I may omit that and go on at the middle of the page, line 23."

VISCOUNT CAVE: Section 109 he refers to as shall, and section 18 as the may clause, which he says is absent in Manitoba. MR. WEGENAST: Yes. "In the John Deere case the company had applied for a license and the application had been refused because a company had already been registered in British Columbia under the same name."

VISCOUNT CAVE: He does not construe section 111 in the same way as the learned Judge did; he says the Lieutenant-Governor may insert. MR. WEGENAST: No. I think he refers to that later; he puts his judgment on a broader ground. He says at the close of the paragraph just above "There is no such provision found in the Manitoba Statute."

VISCOUNT HALDANE: It may be he leaves it open. MR. WEGENAST: He says: "It would appear from section 111 of that Statute, that the Lieutenant-Governor-in-Council may insert in the license limitations and conditions as to the exercise by the company of its powers in Manitoba."

VISCOUNT HALDANE: *Non-constat* that they will be valid. He does not take the point.

VISCOUNT CAVE: But on construction he differs from Mr. Justice Cameron, who held, on page 25, that the words subject to conditions and so on did not

apply to corporations coming within Class V. MR. WALLACE NESBITT: To a Dominion corporation, because of the express language of section 109.

MR. WEGENAST: "It appears to me that the main difference between the two Statutes is, that in British Columbia the Registrar may refuse a license on one of the grounds specified in section 18 of the Act of that province, while in Manitoba the license shall be granted, but may be made subject to conditions and limitations. The license to carry on business in the province, which the Government of Manitoba decides to issue to a Dominion company, whether the license be general or restricted in its terms, must be obtained and accepted by the company. Without a license, the company cannot within the province carry on its business, or exercise the powers, or enjoy the rights conferred upon it under the Companies Act of the Dominion. I would refer to the following passage from the judgment of *John Deere Plow Co.* v. *Wharton,* to be found at page 340 of the report." Then he read it: "It was held in that case that the Parliament of Canada had power to enact section 5 of the Dominion Companies Act and section 30 of the Interpretation Act, Revised Statutes of Canada, 1906, c. 1. Section 5 provides for the creation by letters patent of a company as a body corporate and politic, for any of the purposes or objects (with certain exceptions), to which the legislative authority of the Parliament of Canada extends. Section 30 declares that words making an association of persons a corporation shall vest in such corporation power to sue and be sued, to contract by their corporate name, and to acquire and hold personal property for the purposes for which the corporation was created. Section 29 of the Dominion Companies Act enables a company created by letters patent to acquire and hold any real estate requisite for the carrying on of the company's undertaking. The powers given by this section are necessary concomitants of those conferred by section 5. Again I quote from the judgment in the John Deere Plow case, at pages 340-341.

VISCOUNT HALDANE: We have had that; you can pass now to page 35. MR. WEGENAST: Yes, at the top of the page. VISCOUNT HALDANE: It may be that this is a convenient time to adjourn as there is a great deal more of the judgment to be read, and it will take some time. MR. WEGENAST: If your Lordship pleases.

(Adjourned until Monday morning at 10.30 a.m.)

FOURTH DAY.

VISCOUNT HALDANE: What course do you propose to pursue to-day, Mr. Wegenast MR. WEGENAST: I had intended to finish the reading of the judgments, and then go to what I really intended to be my argument, which, of course, has been anticipated a good deal.

VISCOUNT HALDANE: Yes. We know the points. You were reading the Ontario judgment, were you not? MR. WEGENAST: No, I was reading the judgment of Mr. Justice Perdue in the Manitoba case. It is in document L, at page 31. This is a judgment, the reasoning of which I place considerable reliance upon. I think I had proceeded as far as page 35. I had omitted reading some extracts from the John Deere Plow judgment at page 34.

LORD PARMOOR: I have it marked as the middle of page 35. MR. WEGENAST: I think it is right. In order to establish the connection, to read the paragraph beginning at the top of page 35: "The provisions of the British Columbia Statute were, therefore, inoperative to compel the company (1) to obtain a provincial license of the kind in question, or (2) to be registered in the province as a condition of exercising its powers, or of suing in the Courts. That being so, I see no reason for arriving at any different conclusion in the present case. In my reading of the judgment in the John Deere Plow company case, I cannot find that the matters wherein the Statute under consideration in that case differed from the Manitoba Statute are important in a consideration of the constitutional validity of either." That is to say, he says the differences are not important in considering the constitutional validity. As it appears to me, the essential matters upon which the judgment was founded were that the Statute in question in that case sought to compel every Dominion company to which it applied to take out a provincial license

before the company could carry on business or exercise its powers within the province; that it made it necessary to secure a provincial license to enable the company to sue or to hold land in the province; that if such company carried on its business without a license it would be liable to penalties; that the agents who acted for it would be similarly liable; and that such company while unlicensed cannot sue in the Courts of the province in respect of contracts made within the province. These provisions are also found in the Manitoba Statute. There is a difference in the language used, but the effect is the same. I think no reference has been made as yet to the fact that in the Companies Reference your Lordship treated the question as having been decided. I think one must inevitably assume that your Lordships considered that the John Deere Plow case had been decided on the broad ground as stated in the Companies Reference which was whether a Dominion company could be required as a condition of exercising its power to take out a license in the province. An argument was made by those seeking to uphold the Act in question in the present case that the words "may obtain a license" is used in the British Columbia Companies Act (section 155) while the corresponding section in the Manitoba Companies Act is "shall receive a license." With great respect for the opinion of other members of the Court who take an opposite view, I cannot see how the difference between these two expressions affects the constitutional question involved. The main point is that the object of each Statute is to restrain Dominion companies from exercising within the province the rights conferred upon such companies by their charters unless and until they are licensed by the province.

VISCOUNT HALDANE: I suppose he means there is an enactment which shows that the Dominion company shall not carry on business in the province, or have full status there, unless it has a license, but the province binds itself to grant such a license. That is the argument. MR. WEGENAST: Yes, and it may be pointed out that under the Imperial Companies Act a group of incorporators could mandamus the Registrar. After all in those Acts the question whether an official is acting in a ministerial or discretionary capacity is not the vital question. "It is also urged that by the British Columbia Act an extra-provincial company may not be licensed or registered by a name identical with or resembling that by which a company, society or firm in existence is carrying on business, or has been incorporated, registered, or licensed, or so nearly resembling that name as in the opinion of the Registrar to be calculated to deceive, or if he disapproves of it for any other reason (section 18): while there is not, it is said, any similar provision in the Manitoba section. This, it appears to me, is, if anything, only a difference in the degree in which each Legislature offends in exceeding its powers. The judgment in *John Deere Plow Company* v. *Wharton* was not based upon section 18 alone of the British Columbia Statute. It was based upon other provisions common to both Statutes which were 'directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada dealing with a matter which was not entrusted under section 92 (British North America Act) to the Provincial Legislature,' the quotation being from page 343 of the John Deere Plow judgment. It was argued by counsel for the Attorney-General of the province that the legislation in question in this case does no more than impose a tax, that the requiring of a license was merely a form of direct taxation within the province in order to the raising of a revenue for provincial purposes under No. 2 of section 92 of the British North America Act. In support of this proposition he relied upon the *Bank of Toronto* v. *Lambe*, and *Brewers and Maltsters* v. *Attorney-General of Ontario*. *Bank of Toronto* v. *Lambe* was not a case of licensing a corporation to do business in the province. A Statute of the province of Quebec enacted that every bank carrying on the business of banking in that province, every insurance company transacting the business of insurance in that province and every incorporated company carrying on labour, trades or business in that province, should annually pay the several taxes thereby imposed on them by the Act. The tax so imposed was not, either in substance or in form, a license duty (page 584). The Bank of Toronto had its head office in Toronto, Ontario, but had an agency at Montreal in the Province of Quebec. The tax was held to be direct taxation within the province, and to be valid. (See page 58 of the Report). In Brewers and Maltsters' case, the Liquor License Act of the

Province of Ontario made it necessary that every brewer, distiller, or other person fully licensed by the Government of Canada, should first obtain a license to sell by wholesale under the Act the liquor manufactured by him, when sold for consumption within that province. This enactment was held to be direct taxation and valid within sub-section 2 of section 92 of the British North America Act. There was nothing in the Act which prevented such brewer or distiller from manufacturing or keeping liquor on his premises within the province, and the license was only necessary when he sold for consumption within the province." It was a brewers' license; it was not a companies license. The question of company incorporation, or licensing, did not enter into the case at all.

MR. WALLACE NESBITT: I think it was a company license, as a matter of fact. MR. WEGENAST: There is nothing in the report of the case showing whether the company was a Dominion company or an Ontario company. In fact, it was not raised. It is quite impossible to discover from the report where the company was incorporated, or whether it was incorporated at all. "A province has power to tax a person or corporation doing business within the province, but the two cases just referred to furnish no authority for excluding a Dominion corporation, with powers such as those possessed by the defendant, from doing business with the province, unless and until it has obtained a license of the nature of that required under the Manitoba Companies Act. The Liquor License Act of Ontario mentioned in the Brewers and Maltsters' case was a general law of the province which provided that no person (including a body corporate) should sell by wholesale or retail spirituous or fermented liquors without first having obtained a license under the Act: R. S. O. 1887, c. 194, s. 49. It was a law of general application enacted under section 92 of the British North America Act, and corporations even though licensed by the Dominion to do business throughout Canada would have to obey it in the same manner as they would be bound by the provincial laws relating to real property contracts, sales of goods, chattels, mortgages, etc." Then there is a reference to the John Deere Plow case. "A company incorporated under the Dominion Act with power to carry on the business of distilling and manufacturing alcoholic liquors in Canada would be bound by the provisions of the Manitoba Temperance Act in so far as sales of liquor within that province are concerned. The Manitoba Companies Act may have had in view taxation as one of its objects, but if that were the sole object, why did not the Legislature adopt a method similar to that in the Province of Quebec, which was declared to be valid in the *Bank of Toronto* v. *Lambe?* Such a method has in fact been adopted by the Legislation of Manitoba in the 'Corporation Taxation Act.' R. S. M. 1913, chapter 191'—that Act is in the collection that is before your Lordships—" under which banks, insurance companies, loan, trust, telephone, telegraph, express, and other companies, whether incorporated by an Act of the Parliament of Canada, or otherwise, shall pay an annual tax as provided in the Act. If further taxation were required that Act might have been amended for the purpose. It may be pointed out as a circumstance that the defendant company has its chief place of business at the City of Winnipeg, where it has business premises and a depot of goods. Taxation, therefore, of the kind the province may impose, is readily enforceable against the company. I am unable to distinguish the present case from *John Deere Plow Company* v. *Wharton*. I would quote from the conclusion arrived at in that case (pages 343-344)." These have been read, except that the last part of the paragraph there has, I think, not been read, and in my argument I propose to dwell upon that as containing most important expressions in the judgment. I will, therefore, read the whole paragraph to get the connection. "In the opinion of their Lordships it was not within the power of the Provincial Legislature to enact these provisions in their present form. It might have been competent to that Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should, under a Statute of general application regulating procedure, give authority for costs. But their Lordships think that the provisions in question must be taken to be quite of a different character, and to have been directed to interfering with the status of Dominion companies, and to

preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under section 92 to the Provincial Legislature." Then comes the section which, in my opinion, is the crux of this decision. "The analogy of the decision of this Board in *Union Colliery Company* v. *Bryden* therefore applies. They are unable to place the limited construction upon the words 'incorporation' in that section which was contended for by the respondents and by the learned counsel who argued the case for the province. They think that the legislation in question really strikes at capacities which are the natural and local consequences of the incorporation of the Dominion Government of other companies with other than provincial objects; I would answer the first four questions in the negative. As to the first part of the fifth question, I would answer: In so far as the defendant's legal capacity to take a lease without being first licensed under the Manitoba Companies Act is concerned. Yes. To the remainder of the fifth question I would answer: No."

VISCOUNT HALDANE: Where does the word "incorporated" occur in the section? MR. WEGENAST: It is read in by implication. Because the word incorporation in section 9 was limited to a company with provincial objects, therefore, I take it, the word "incorporation" must be taken as read into section 91, that is to say, it must be taken that the Dominion has power to incorporate all companies with ultra-provincial objects, and I take it that that was the meaning.

VISCOUNT HALDANE: How is it proposed to limit it; how was it sought to limit the expression "incorporation?" MR. WEGENAST: Sir Robert Finlay argued for this before your Lordships, and Mr. Lafleur also.

VISCOUNT HALDANE: He is not talking of the Bryden case; he is talking of the John Deere Plow case. MR. WEGENAST: Yes.

VISCOUNT HALDANE: I understand now. MR. WEGENAST: If your Lordships will remember Sir Robert Finley and Mr. Lafleur argued exhaustively for the view exactly as stated by the Chief Justice of Ontario, viz., that the company received from the Dominion its status——

LORD PARMOOR: You see what their Lordships state in the John Deere Plow case is that the Provincial Statute seems to have been directed to interfering with status. Supposing you have a requirement for registration which is open to everyone, how does it affect the status of a company? Within the provincial area the only way it could do it was to say that they could not exercise the powers which the Dominion Government had given them without registering, but anybody could register, and then they could carry on business. What objection would there be to that? MR. WEGENAST: If I correctly understand your Lordship I say there is no objection to registration.

VISCOUNT HALDANE: Sir John Simon said there was. He said any registration or license. Anyone may register, and then they can carry on their business. MR. WEGENAST: If that is the case I think my answer would be entirely different. Here the registration is for the purpose of justifying corporate operations.

VISCOUNT HALDANE: They can register, and then they can carry on their corporate business. MR. WEGENAST: Not for simply furnishing information?

VISCOUNT HALDANE: That is the distinction. MR. WEGENAST: If the object of the registration is to secure sanction for the operations of this company not *qua* brewer, but *qua* company——

VISCOUNT HALDANE: It goes to status. MR. WEGENAST: Yes.

VISCOUNT HALDANE: That is what is meant by saying it goes to status. MR. WEGENAST: Yes.

VISCOUNT HALDANE: Something more general than any power. MR. WEGENAST: Yes. We do not object to the registration provision of Quebec where the company is asked to publish in a public register certain information and to pay a fee commensurate with the work of registration.

VISCOUNT HALDANE: We quite understand that. Then Mr. Justice Haggart agrees. MR. WEGENAST: Then, my Lords, I come to the judgments in the Supreme Court of Canada. This is in the document N. The Chief Justice says it, page 14: "This is an appeal from the judgment of the Court of Appeal for Manitoba which on an equal division of opinion amongst the Judges of that Court upheld the judgment of the trial Judge affirming the constitutionality of those provisions of

the Manitoba Companies Act which were in question in that case. The case was one in effect asking the Court to construe and apply to the sections in question of that Act the principles laid down by the Judicial Committee in the case of *Jorn Deere Plow Company* v. *Wharton,* 1915, Appeal Cases, 330, which should govern and control provincial legislation with regard to Dominion companies. Amongst those principles it was stated by their Lordships that the 'province cannot legislate so as to deprive a Dominion company of its status and powers.' Their Lordships went on, however, to state that this does not mean that the companies could exercise those powers in contravention of the laws of the province restricting the rights of the public in the province generally, but simply that the status and powers of the Dominion company as such cannot be destroyed by provincial legislation, and they held that it followed from these premises that the provisions of the Act of British Columbia there in question compelling the Dominion company to obtain a provincial license or to be registered in the province as a condition of exercising its powers or of suing in the courts are inoperative for these purposes. Applying these principles and this conclusion of their Lordships to the case of the sections of the Manitoba Statute now before us, I cannot reach any other conclusion than that these sections are *ultra vires.* I have, in my reasons for judgment in the case before us on the Saskatchewan Companies Act, argued at the same time as this appeal was, stated shortly why I reached the conclusion that the sections there in question were not *ultra vires* of the Leguslature excepting one section requiring the company carrying on business within the province to take out a license from the province to enable it to do so, and I there suggested that that one section might and should be construed as applicable only to foreign companies other than Dominion ones. In the case now before us, however, the legislation of Manitoba is entirely different from that of the Province of Saskatchewan, which latter legislation had been revised after the decision of the Judicial Committee in the Wharton case, 1915, Appeal Cases, 330, with the evident intention of complying with the principles laid down in that case. It seems to be clear from the decision of the Judicial Committee in the Wharton case that while to some extent a Provincial Legislature may regulate and tax the activities within the province of a Dominion company, it cannot for any purpose prohibit or restrict its entry into the province or its carrying on business there. The primary question then with respect to the Manitoba legislation is whether the provisions of Part IV. of its Companies Act, purporting to confer upon such companies when a provincial license has been obtained and while it is in force, power to carry on business in Manitoba, exercise their powers, enforce their legal rights in the courts on contracts or otherwise, and hold land necessary for their business and until the license has been granted or after it has ceased to be in force to prohibit them from doing any and all of these things, are *ultra vires* of the provincial Legislature." There, taking it in the mathematical sense, the necessary subtraction from the company's powers, either before the license is issued, or after it has ceased to be in force, is an invasion of the company's status: "In my opinion, such legislation, if upheld, would directly deprive the company of its status and powers conferred upon it by its Dominion charter and is clearly contrary to the principles laid down by the Judicial Committee in the Wharton case as those which should control and prohibit provincial legislation with regard to Dominion companies. The provisions of Part IV. of the Companies Act of Manitoba are, it is true, not identical with those of the British Columbia Act condemned by the Wharton decision, but with the exception of section 18 of the Act of British Columbia empowering the Registrar to refuse a license under certain circumstances to a Dominion Company, they are substantially the same."

Viscount Cave: That is the one about the name. Mr. Wegenast: Yes: "I agree with the contention of Mr. Robinson, counsel for the Dominion Government, that the decision in the Wharton case did not rest upon section 18 or upon the fact that under it the Registrar had refused a license to the appellant. The Lord Chancellor, at page 338 of the report of that case, states the question for determination by their Lordships to be whether legislation prohibiting unlicensed companies from suing in the province and penalizing the carrying on of their business there and prohibiting the licensing of a company with the same name as one already in the province was valid legislation. At page 341 he answers his questions

as follows: 'It follows from these premises that the provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of that kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the courts, are inoperative for these purposes. The passage in the judgment at page 243, where their Lordships indicate what legislation would have been competent for the province, shows clearly that the whole of the legislation there in question was decided to be beyond the provincial powers." That one expression in the judgment in the John Deere Plow case would, I submit, be conclusive, *i.e.*, where your Lordships say registration "for certain limited purposes." If there had been any intention to limit the John Deere decision in the way suggested by the Judges of the lower Court that expression would not have been used. "For these reasons and for those stated by Mr. Justice Perdue in the Court of Appeal, with which I fully agree."

VISCOUNT HALDANE: He allows the appeal. MR. WEGENAST: Yes. Then Mr. Justice Anglin says: "Not I confess, without some hesitation, I have reached the conclusion that this appeal should be dismissed. A vital difference in my opinion between the Manitoba Act, now under consideration, and the British Columbia Statute dealt with in *John Deere Plow Company* v. *Wharton,* 1915, Appeal Cases, 330, lies in the absence from the former of any provisions similar to section 18 of the British Columbia Act (section 6, chapter 3, Statutes of 1912), which enabled the Registrar to refuse a license to any Dominion company whose name resembled that of an existing company, society, or firm carrying on business or calculated to deceive, or otherwise in his opinion objectionable. The refusal to grant a license under this provision was the ground of complaint in the Wharton case. With great respect. I thought I made it perfectly clear in the argument that that was not our objection. I could point out your Lordships to passages in which the matter was expressly dealt with: "The Manitoba Act, on the other hand, by section 109, expressly provides that the right of a Dominion company—which in this respect differs from any other extra-provincial company (section 110)—shall be absolute. I cannot but think that the condemnation in the Wharton case of several sections of the British Columbia Act prohibiting an unlicensed Dominion company from carrying on business, denying to it the aid of the provincial courts, etc., depended largely, if not entirely, on the fact that the obtaining of a license by such a company was not made an absolute right under the Statute, but rested in the discretion of the Registrar. These sections were not condemned by the Judicial Committee without qualification, but only 'in their present form' (page 343). It was the discretion which section 18 purported to vest in the Registrar that, if valid, would amount to an interference 'with the carrying on the business in the province of a Dominion company' (page 337)—that would enable that provincial official 'to deprive a Dominion company of its status and powers.' Short of such interference or deprivation, the right of the province to subject Dominion companies in common with others, to taxation and to registration for purposes pertaining to the administration of justice or to civil rights in the province such as holding of property and the making of contracts, is fully recognized by their Lordships (pages 341 and 343) and the exercise of such control may take the form of requiring the Dominion company, like others, to take a license to trade from the province. The power to exact compliance with legislation of that character implies the right to enforce it by appending appropriate sanctions. So long as the Dominion company by paying the tax imposed or making the entry required has absolute right to obtain the provincial license, its status as a company is unimpaired and the exercise of its powers and functions is not unduly fettered. Of course a province may not under the guise of taxation, or of the exercise of any of its powers under section 92 of the British North America Act, in substance and reality require a Dominion company to re-incorporate." That is what we say under the Saskatchewan case: "or otherwise to acquire from it anything in the nature of status, capacity or powers. The 'pith and substance' of the legislation must be taken into account. But I agree with the views expressed by Meredith, Chief Justice of Ontario, in *Currie* v. *Harris Lithographing Company,* 41 Ontario Law Reports 475, at page 490-1, as to what should be the attitude of the

Court in approaching the consideration of this phase of the case. Dealing with them in the spirit indicated by the learned Chief Justice, I incline to accept the view of Mr. Justice Cameron that the concluding words of section 111 of the Manitoba Statute—'such limitations and conditions as may be specified in the license'—which would otherwise be a source of embarrassment, should be held to relate only to the other 'foreign' companies falling under section 110, which contains corresponding terms, and not to Dominion companies excluded from the application of section 110, and specially provided for by section 109, which entitles them to be licensed without qualification." The remarkable thing is that Mr. Justice Anglin seems to overlook in the Saskatchewan case the fact that the whole Act must be read into the license; that the company becomes to all intents and purposes a local company: "Approaching the Manitoba Statute with a view of upholding it, if by fair consideration of them the impeached provisions can be brought within the provincial legislative powers—I think they may be regarded as an exercise of the powers of direct taxation, and in regard to the administration of justice and the control of civil rights conferred on the provincial legislatures by section 92 of the British North America Act, and as not involving such an interference with status, capacity or powers of Dominion companies as would bring them within the condemnation of the Judicial Committee in the Wharton case."

Then, my Lords, I come to the judgment of Mr. Justice Brodeur. He says: "The appellant company is incorporated under the authority of the Companies Act of Canada (Revised Statutes of Canada, chapter 79) and is empowered to carry on its business throughout the Dominion of Canada and with its head office in Winnipeg, in the Province of Manitoba. By the provisions of the Companies Act of Manitoba (Revised Statutes of Manitoba, chapter 35, sections 106 to 130) which deal with extra-provincial corporations, a license has to be applied for by all those corporations to the provincial authorities; the license will have to be obtained before these corporations can carry on business in the province and they will not be authorized to acquire and hold real estate in the province, except to the amount and the value mentioned in the license." Your Lordships recognize there are limitations in the Manitoba license: "The appellant company not having applied for such a license, the respondent, Davidson, one of its shareholders, has instituted an action to force the company to take such a license, and the Attorney-General of Manitoba has intervened in support of that action and to maintain the validity of these provisions which were attacked by the appellant company. It is claimed by the latter that the decision of the Privy Council in the case of *John Deere Plow* v. *Wharton,* 1915, Appeal Cases, page 330, sustains their contention. The John Deere Plow Company case has reference to the construction of the Companies Act of British Columbia, which empowered the provincial authorities to refuse to a federal company the right to carry on business on the ground that there was another company of the same name upon the local register. The evidence showed that the John Deere Plow Company had applied for a license and that its application had been refused. Such legislation and action affected the status of the company itself, though it had been incorporated by the Dominion authorities; and the Privy Council decided (1915, Appeal Cases 330) that the legislation was *ultra vires* of a Provincial Legislature. There is between the British Columbia legislation and the Manitoba legislation a vast difference. While the British Columbia legislation gave the provincial authorities the power to refuse the license (section 18, British Columbia Statutes) the Manitoba Statute declared, on the contrary (sections 108-109) the corporation created under the authority of Parliament of Canada and authorized by their Act of incorporation to carry on business in Manitoba are entitled to receive a license to carry on their business. What is the nature of that license ? It is a method of taxation by which to secure a revenue for the purpose of the province. All the companies, whether incorporated by the local Legislature, or by the Dominion Legislature, by any foreign state or any provincial authority, are bound to pay the same license in proportion to their capital. The object of this legislation is also to keep the public informed as to the status of those companies. They have to file a certified copy of their charter, that they are authorized to transact business under their charter; they must have in the province an agent to accept service of process in all suits, except in the case where the head office of the

company is in the province; and to publish at their expense in the Official Gazette, and in a newspaper, the fact that they are duly authorized to carry on business in the province. It is of the utmost importance for a person who contracts with a corporation to know the legal status of the latter and to see whether the control contemplated is within the powers granted by the company by its Act of incorporation or its letters patent. The unauthorized and fictitious companies will then be prevented from deceiving the public, since anyone may obtain from the Provincial Secretary information as to any *bona fide* company, and may ascertain the powers and standing of such company in the same manner as if the company had been incorporated by the provincial authority, Perhaps that knowledge could be procured in applying to the Dominion authorities, but who is going to inform the person desirous of procuring that information that the company is a federal company? It might be a foreign or provincial company. Besides, the distances in our country are so great that each province should have in its capital the necessary data as to the existence, the status and the capacity of the company. The obligation for a federal company to take out a license under the Manitoba Statute is a law of general application. The companies incorporated locally have to pay just as well as the companies incorporated outside the province. In the case of *Bank of Toronto* v. *Lambe,* 12 Appeal Cases, page 575, that question has been decided. It was there held that though the banks are incorporated by the Dominion Parliament, they may be bound to contribute to the public objects of the province where they carry on business. It is contended by the appellant that its status as a federal company is affected because the law provides that before carrying on business it is bound to take a license. There is a distinction to be made when it is said that a company will not trade in a district and that if a company, if it does, must have a license. The question came up in the case before the Privy Council in 1897 of the *Brewers and Maltsters* v. *Attorney-General* (1897 Appeal Cases, page 231). It was the case of a Dominion company incorporated by a Dominion charter." His Lordship is mistaken there.

MR. WALLACE NESBITT: I do not think so. We are sending down for the original.

MR. WEGENAST: All I can say is it was not a factor in the case. It does not appear from the report. It was a Dominion license to sell liquor that was in issue, and it was argued by Mr. Blake that by granting the company a license to sell liquor the Dominion had occupied the whole field. Those were the days when the doctrine of the occupied and unoccupied field was in vogue.

VISCOUNT HALDANE: A very unintelligible doctrine. MR. WEGENAST: Yes. Mr. Blake argued that by licensing the company to sell liquor, not as a company—it was not a question of corporate powers at all, it was a question of the power to sell liquor—the Dominion had occupied the whole field.

VISCOUNT CAVE: It was a license to manufacture liquor, was it not? MR. WEGENAST: To manufacture and sell liquor. Mr. Blake contended that the Dominion had occupied the whole field, and there was nothing left for the provincial legislation to operate upon. That was Mr. Blake's main argument: "authorized by a Dominion license to manufacture liquor in all the provinces of the Dominion. The Ontario Legislature passed an Act declaring that before a person could sell liquor in Ontario he would have to take a license from the provincial authorities. That legislation was hedd valid."

VISCOUNT HALDANE: The doctrine of the unoccupied field did not prevail in that case. Mr. Blake was urging that the Dominion had occupied the field. MR. WEGENAST: Yes.

VISCOUNT HALDANE: Ontario was adjudged entitled to impose a license duty. MR. WEGENAST: Yes, the doctrine did not prevail in that case, because it was held that this was a matter within the competence of the province; it was not a case of an occupied or unoccupied field. That doctrine finally reached its culmination in 1904 in the Assignments case with regard to the Ontario Assignment Act, where the issue was as to whether a province could pass legislation dealing with the property of insolvents, the Dominion not having in the meantime legislated under bankruptcy.

VISCOUNT HALDANE: It is a mere illustration of things that in one aspect may be under section 92, and in another aspect may be under section 91, but it is an unintelligible doctrine. MR. WEGENAST: Yes, and it is quite caustically dealt with by Mr. Justice Clement in his work.

VISCOUNT HALDANE: I am not surprised. MR. WEGENAST: It is very fairly and very caustically dealt with there.

LORD PARMOOR: The last case was decided upon the authority of the Lambe case. MR. WEGENAST: Yes. They held it was taxation, and they said even if it were license they could not say this was not license within the genus of item 9.

LORD PARMOOR: It was a question of whether it was taxation. MR. WEGENAST: Yes. "I am unable to distinguish this case from that decided by the Privy Council. It is contended also that the legislation is *ultra vires,* because there is a restriction as to the powers of this federal company to hold real estate in the province."

VISCOUNT HALDANE: I think you have read all that matters in this judgment. I have read it through, and there is nothing more. MR. WEGENAST: If your Lordship pleases. Then there is the judgment of Mr. Justice Mignault, which is the last one. He says: "I so fully agree with the reasons for judgment of Mr. Justice Perdue of the Court of Appeal of Manitoba, that it does not seem necessary to state at any length why it was in favour of allowing this appeal. In expressing my opinion I shall strictly confine myself to the concrete case which is before his Court and avoid stating general rules governing, in matters of company legislation, the jurisdiction of the Dominion Parliament or of the Provincial Legislatures, the more so as the Judicial Committee of the Privy Council has formulated, in case of the *John Deere Plow Company* v. *Wharton,* a plain rule whereby the present controversy can be decided."

VISCOUNT HALDANE: You need not read that again. We have read that, and the passage from Mr. Justice Perdue on the following page we have also had. MR. WEGENAST: Yes. "Applying this test to the legislation in question, which was adopted before the John Deere Plow case was decided, there can be no doubt that it cannot be sustained. I am here satisfied to adopt the statement of the purport and effect of this legislation made by Mr. Justice Perdue."

VISCOUNT HALDANE: We have had that. MR. WEGENAST: Yes, line 45: "This legislation, no doubt, differs from the British Columbia Statute, the validity of which was questioned in the John Deere Plow Company case, but it clearly fails when the jurisdiction of the Manitoba Legislature is measured by the test laid down in that case. This Statute compels the appellant company to obtain a license and to be registered as a condition of exercising its powers and of suing in the Courts." I submit that that is absolutely conclusive. "This the Legislature could not do. It has been contended that this is a taxation measure and as such was one which it was competent for the Legislature to enact. It is further urged that the province has exclusive mortmain jurisdiction and that, therefore, it is for it alone to determine the conditions under which a Dominion corporation can acquire and hold property. I think the answer is obvious. Granting the jurisdiction of the province in these matters, the province cannot, in my opinion, so exercise this jurisdiction as to deprive a Dominion company of its status or powers. In other words, it cannot, in imposing taxation, prevent the company from exercising its powers until it has paid the taxes imposed." That goes to the very essence of the argument of my friend against me—"Nor can it, as was done by this Statute, deprive the company of its power and capacity to acquire, hold and dispose of real estate in Manitoba, or to carry on its business, unless and until a provincial license is obtained. To decide otherwise and to sustain the validity of such a Statute would in effect restrict the power of the Dominion Parliament to the creation of the company and the enumeration of its powers, but the company would find itself paralyzed and its powers would be inoperative so long as it has not complied with the requirements exacted by the province. I cannot find that the Judicial Committee ever contemplated in the John Deere Plow case, that this could be done."

VISCOUNT CAVE: Was there not a fifth judgment? MR. WEGENAST: Yes; that is the judgment of Mr. Justice Idington which covers at once and the same time the Saskatchewan and Manitoba cases.

VISCOUNT HALDANE: He was against you? MR. WEGENAST: Yes.

VISCOUNT HALDANE: What are you going to do next? MR. WEGENAST: I should like to now state my general proposition.

VISCOUNT HALDANE: Have you finished the judgments? MR. WEGENAST: Yes.

VISCOUNT HALDANE: We have them all now. MR. WEGENAST: Yes.

VISCOUNT HALDANE: We have nothing to do with British Columbia. We have had the Ontario judgment; we have had the Manitoba judgment and the Saskatchewan judgment. MR. WEGENAST: Yes.

VISCOUNT HALDANE: We have now all the materials before us. MR. WEGENAST: Yes.

VISCOUNT HALDANE: Let us see if we cannot bring this to a focus. In the first place, a corporate entity is called into corporate existence which means really the setting up of a company with powers. MR. WEGENAST: Yes.

VISCOUNT HALDANE: That is the first proposition. Then the second proposition is that a company so set up can have no greater status than any natural person who goes into the province which he is entitled to do. The province has no power to keep any natural person in general from going, although it can deal with their civil rights when they get in. MR. WEGENAST: Yes.

VISCOUNT HALDANE: The company gets in with these rights. The John Deere Plow Company's case decided that the Provincial Legislature cannot pass Statutes which will cut down the powers which belong to their status. They may on the other hand pass the legislation that they would pass with regard to all persons, natural and artificial, within the province. It was decided British Columbia had done more than that; they had struck at the status. What you have to show is that these three provinces, Saskatchewan, Manitoba and Ontario, have done the same. thing. MR. WEGENAST: Yes. I am very glad to have your Lordship put it in that way, because it was exactly what I was going to state.

VISCOUNT HALDANE: Is not your proper course now to take each province and tell us in what way each comes within the same category of things as in the John Deere Plow Company's case beginning with Manitoba? MR. WEGENAST: Yes, I had intended to do that, but before that would it please your Lordships if I try to state in a general way what I conceive the status to consist of or what is the effect of incorporation so that we may carry that along with us into the enquiry.

VISCOUNT HALDANE: Do it shortly, because we have that very much present to our minds one way or the other, I do not say which way, but we know the point. MR. WEGENAST: If your Lordship pleases. The conception of status inevitably implies comparison; the question of discrimination or differentiation comes in at once. "Status" has been defined in one case by Lord Justice Brett in the case of *Niboyet* v. *Niboyet*. He says: "The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of the community."

VISCOUNT HALDANE: He is defining that for the purpose of divorce law, and he decided that in a judgment that was afterwards found to be wrong, so that it does not help you very much. What do you want to cite authorities or dictionaries or anything else for on that. Surely what you say is the status of a company is this: It is its vitality and the position that it gets from being called into existence as an artificial person under the law; it is not the fact that it is merely an incorporation; it is an incorporation with living powers. MR. WEGENAST: What I am going to emphasize, if I may, is that it is a matter of comparing what the person or company in question can do as compared with other persons or other companies. For instance, in the Bryden case, it was said that Chinamen must not work in mines. If it had said that nobody must work in mines; nobody under the age of 30 years must work in mines, including Chinamen, there would have been no differentiation or discrimination. The offence was to put Chinamen into a different position rom other grown up men in the community, and that is the point I have in mind.

VISCOUNT HALDANE: It struck at aliens and immigration. MR. WEGENAST: Yes. When you come to that sort of discrimination you must at once be on the look out for status.

VISCOUNT HALDANE: I do not think that takes you very much further because it is perfectly plain that the province can legislate very copiously as regards the status; it can legislate to the effect that people under 21 cannot make contracts. MR. WEGENAST: Yes.

VISCOUNT HALDANE: That goes to status. You cannot say that the province cannot legislate copiously with regard to status. The question is whether it has legislated in a way that is forbidden here. MR. WEGENAST: Was it directed to the class of Dominion companies or was it directed to a class including Dominion companies and foreign companies? Then we say it goes to the status.

VISCOUNT HALDANE: It is not because it goes to status that you object to it, but because it strikes at the exclusive Dominion power. MR. WEGENAST: When it strikes at a class which is created in the exercise of Dominion power.

VISCOUNT HALDANE: It is the power that goes beyond status. That makes the difference. MR. WEGENAST: Yes. It was in that view that I wanted to state my general proposition that when the province interferes with the very thing that is implied by incorporation then it offends. What does incorporation mean? It does mean the setting up of an artificial entity with certain metaphysical capacities, but that is not all; it means conferring the power to sue and to be sued; it means conferring the power to hold personal property which is provided for in the Interpretation Act by the Dominion; it means conferring the power to hold real property; it means conferring the power to make contracts, and incorporation is simply one. It is the creation of a bundle of powers and attaching labels to them.

VISCOUNT HALDANE: It means this: You can call an artificial person into existence and under section 91 you may endow it with the power required for its existence. MR. WEGENAST: Yes.

VISCOUNT HALDANE: You cannot do that in the province with a company which is to operate outside the province. You may call it into existence and give it capacity, but you cannot give it any power outside the province. In the case of a company with non-provincial objects which is intended to operate irrespective of whether it is in the province or not, then the Dominion has the power and the exclusive power because it is conferred by section 91 to incorporate a company with non-provincial powers. You say it has done that here? MR. WEGENAST: What I wanted to direct your Lordships' mind to if I can is the fact that this provincial legislation is directed to these very powers which are implied in incorporation. The power to sell liquor is not implied in the incorporation.

VISCOUNT HALDANE: Of course, if you are right in that you make a very strong point, and you may be right, a great many of the Judges have held so. What you have to do, therefore, comes back to this. You have to take powers which were held to be improperly struck at in the John Deere Plow Company's case and to show that the power of the province in question here comes under the same principle. MR. WEGENAST: I want to guard myself against arguing that the province cannot strike at the exercise of powers.

VISCOUNT HALDANE: Of course it can strike at the exercise of everybody's power under civil rights. MR. WEGENAST: If it is operating in the proper plane, the proper kind of law, the province can make it impossible for a company to sell liquor; they can make it impossible for the company to hold lands, though I would there submit that the exercise of the power to carry on trade and commerce must necessarily imply the holding of at least a place for the company to stand upon, but the province can do a great many things if it goes about it in the proper manner, by legislation operating in the proper plane, if I may use that term. It is not a question whether the province can or cannot do a certain thing; it is a question of whether the province can or cannot pass a certain kind of law. I am not sure that I am making my point clear.

VISCOUNT HALDANE: I think we understand it. MR. WEGENAST: If I may state it again, I will not labour it, it is not a question whether the province can make it impossible for a Dominion company to sell liquor.

VISCOUNT HALDANE: You had better keep to the proposition that things which in one aspect may have power in another aspect have not. MR. WEGENAST: That is another way of stating the same thing. It is not within the provincial

powers in my submission to attack this company or deal with this company *qua* company.

VISCOUNT HALDANE: To take it the other way, it is not within the provincial powers to say that a Chinaman is not to come in and work in the mines, because it is not within its power, but it could pass legislation with regard to civil rights that would deprive all persons, Chinamen or not, of the right. MR. WEGENAST: Yes; the province could not deal with the Chinaman *qua* Chinaman, but they could deal with him *qua* man, *qua* citizen of the province, and it makes all the difference in the world. In the Brewers case they dealt with brewers *qua* brewers.

VISCOUNT HALDANE: If that is so there is not much difficulty about the question of principle; it is a question of the application of it. MR. WEGENAST: Yes, I did want to get my way of putting it before your Lordships before examining these Acts in question to determine what is their effect.

VISCOUNT HALDANE: Do you not think we have got your way of doing things. You must give us a little credit for following it. MR. WEGENAST: Perhaps I have laboured it a little, but I have been taken out of the line of my argument in one way and another so much that I did wish to sum it up.

VISCOUNT HALDANE: I will put it again to you. Speaking for myself as at present advised and subject to Mr. Nesbitt's argument, the John Deere Plow Company's case decided that you could not if you were a Provincial Legislature take away the cacapity and the powers which had been conferred on an unincorporated person by a Dominion within the Dominion power. That is what the John Deere Plow Company's case decided. MR. WEGENAST: Yes.

VISCOUNT HALDANE: And it further decided that the British Columbia legislation has sought to do so. MR. WEGENAST: Yes.

VISCOUNT HALDANE: I do not think what you have said goes really further than that. I am talking now of the broad foundation. If it be the principle, is not the next step to see whether they have differentiated themselves from British Columbia? I anticipate that Mr. Nesbitt is going to argue stoutly that they have. MR. WEGENAST: That brings us right up against the question that I tried to argue in the John Deere Plow case and which Sir Robert Finlay tried to argue the other way, but both of us were stopped in the argument. Lord Sumner put it very clearly for me in the argument in the John Deere Plow case at page 41 of the book: "You want to show I suppose that Part 6 of this Act is company law and nothing else," etc. (reads to the words) "that is your proposition" and I said "yes." Then I said I wanted to go on and show that, and then when Sir Robert Finlay took up the argument, or rather it was in the course of an interruption of Mr. Newcombe's argument, Sir Robert Finlay was asked by your Lordships whether he intended to argue that this was a tax and he said "yes, I had intended to argue so," and your Lordship said "it is really difficult to say," etc. (reads to the words) "enforcible." That is at page 78. That I understand is the substance of my learned friend's argument. Then Lord Moulton said: "I do not know whether you have the gravity to suggest this"; the argument really was taken from Sir Robert Finlay in that way, so that we did not argue that point. How shall I argue as to what sort of legislation this is?

VISCOUNT HALDANE: Can you put it better than Lord Sumner put it? He suggested this was company law. MR. WEGENAST: All I can do is to say it is company law, I cannot go any further.

VISCOUNT HALDANE: No, and you best get at that by going to the sections. MR. WEGENAST: Yes, I have dealt with them in my case. May I refer to my case instead of to the sections?

VISCOUNT HALDANE: Yes, it will be very convenient. The general argument is at page 8. Where is the particular argument? MR. WEGENAST: At page 20, paragraph 55, of my case.

VISCOUNT HALDANE: That is all the Provincial Acts put together. What I rather wanted to find was each province.

LORD PARMOOR: Page 2 deals with the Saskatchewan cases. MR. WEGENAST: Yes, but that simply states the facts in a general way.

VISCOUNT HALDANE: The general facts. Have you anywhere dealt with the sections? MR. WEGENAST: Only in a general way, that they offend in five respects.

That is set out on page 20, paragraph 54, and I think your Lordships will follow me at once if I read that summary.

VISCOUNT HALDANE: You have dealt with all these things as if it was the same Act. MR. WEGENAST: I understood that was your Lordship's wish; it made it rather difficult, but I understood that was what was wanted when the cases were consolidated.

VISCOUNT HALDANE: They were consolidated for hearing but not for distinguishing the points. However, we have this very valuable document of Mr. Asquith's. You may from your point of view desire to add to that or modify it. MR. WEGENAST: What I wanted to do was to read the five items of paragraph 54 and then examine the itemized sections. Paragraph 54: "As showing the real character of the Provincial Acts in question, the following general features of the Acts may be referred to:—(i) They purport to render illegal the carrying out of the company's corporate objects unless and until such objects have received provincial sanction through the officials having control of the status of companies locally incorporated. (ii) They purport to place unlicensed or unregistered companies and their agents under substantial penalties for attempting to carry on business in the province. (iii) They purport to deny to unlicensed or unregistered companies capacity and status." In the case of Manitoba and Ontario expressly and in the case of the Saskatchewan we say impliedly. "(iv) They purport negatively to prohibit unlicensed or unregistered companies from holding real or personal property, or affirmatively to permit companies to hold such property from and after becoming licensed or registered. (v) They purport to impose upon companies as a condition of the obtaining of a license or registration the payment of fees similar to the incorporation fees paid by companies incorporated or registered under provincial legislation"; by reference to the itemized list I think all that is absolutely justified. This list I take it was prepared to show the parallel between British Columbia on the one hand and the other three on the other, and not for the specific purposes I have in view.

VISCOUNT HALDANE: There is a requirement for registration and license. Had not we better read through this first page of Mr. Asquith's summary and compare them? MR. WEGENAST: Yes. In the case of British Columbia we find section 139: "Every extra-provincial company having gain for its purpose an object within the scope of this Act is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the province until such extra-provincial company shall have been licensed or registered as aforesaid."

VISCOUNT HALDANE: This seems to be just what Lord Sumner called company law. MR. WEGENAST: Yes.

VISCOUNT HALDANE: You must register. It does not say it is for taxation, but you are not to carry on business until you register. MR. WEGENAST: Then the Ontario and Manitoba Acts are pretty much verbatim the same. They are all taken from the Ontario Act. In the Manitoba Act the provision is: "No corporation coming within Class V. or VI. shall carry on within Manitoba any of its business unless and until a license under this part so to do has been granted to it, and unless such license is in force, and no company, firm, broker, agent or any other person shall, as the representative or agent of, or acting in any other capacity for any such corporation, carry on any of its business in Manitoba unless and until such corporation has received such license and unless such license is in force." There are some slight variations but nothing going to the essence.

VISCOUNT HALDANE: It is a license so to do. This is, to carry on its business. MR. WALLACE NESBITT: There is a good long proviso that ought to be inserted.

VISCOUNT HALDANE: Does the proviso make any difference? MR. WALLACE NESBITT: I think so because it allows the carrying on of business as long as they are non-resident in the province and they can carry on by travellers or correspondence in the way they usually do, so long as they are not residents of the province.

VISCOUNT HALDANE: If they are outside the province they can send in their travellers. MR. WEGENAST: Yes, and do it by mails and so on. We think it makes a substantial difference.

VISCOUNT CAVE: If they have no resident agent in the province. MR. WALLACE NESBITT: If they do not have an office.

VISCOUNT CAVE: It is no resident agent. MR. WALLACE NESBITT: Yes, and no office or place of business.

MR. WEGENAST: The Supreme Court of Canada held in the *John Deere Plow Company* v. *Agnew* that the effect of the British Columbia Act was just the same as the other Acts which contained the proviso. They said no person was to be deemed to be carrying on business in the province unless he establishes what amounts to a branch. Your Lordships may not agree with that decision, but that is why the proviso was not included. It was because of that circumstance that the Agnew case did not come before your Lordships instead of the Wharton case. The Agnew case went off on that point. Then the Ontario Act is: "No extra-provincial corporation coming within Class 7 or 8 or 9 shall carry on within Ontario any of its business unless and until a license under this Act so to do has been granted to it, and unless such license is in force, and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial corporation, carry on any of its business in Ontario unless and until such corporation has received such license and unless such license is in force."

VISCOUNT HALDANE: You say that is objectionable in some way? MR. WEGENAST: Yes, that is company law.

MR. WALLACE NESBITT: There is a special proviso.

MR. WEGENAST: Yes, and there is a special proviso in the Saskatchewan Act. I have already made my submission on that. Then Saskatchewan follows more closely the British Columbia Act. Section 23(1) is: "Any company whether incorporated under the provisions of this Act or otherwise, having gain for its object, or part of its object, and carrying on business in Saskatchewan, shall be registered under this Act."

VISCOUNT HALDANE: Is there anything which says what is to happen if it is not registered? MR. WEGENAST: Yes, that comes later. it is called an offence and it is subject to a penalty of 50 dollars a day: "If any extra-provincial company, other than an insurance company, shall without being licensed or registered pursuant to this or some former Act, carry on in the province any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day." In Ontario it is: "If any extra-provincial corporation coming within Class 7, 8 or 9, contrary to the provisions of section 7, carries on in Ontario any part of its business, such corporation shall incur a penalty of 50 dollars for every day upon which it so carries on business." Then in Manitoba it is: "If any corporation coming within Class V. or VI. shall, contrary to the provisions of section 118, carry on in Manitoba any part of its business, such corporation shall incur a penalty of fifty dollars for every day upon which it so carries on business." In Saskatchewan there are two penalties: "Any unregistered company, carrying on business, and any company, firm, broker, or other person carrying on business as a representative or on behalf of such unregistered company, shall be liable to summary conviction, to a penalty not exceeding 50 dollars for every day on which such business is carried on in contravention of this section, and proof of compliance with the provisions of this section shall be at all times upon the accused." Then section 25: "Every company which carries on business in Saskatchewan without a license and every president, vice-president, director and secretary or secretary-treasurer of such company, shall be respectively guilty of an offence." Your Lordships have observed that that is what we are convicted of.

VISCOUNT HALDANE: The first was for carrying it on unregistered and the second was for carrying it on without a license. MR. WEGENAST: Yes, a penalty of 25 dollars a day.

VISCOUNT HALDANE: You say these are company matters. MR. WEGENAST: Yes. They are directed at the company *qua* company to prevent it carrying on business without a local sanction and local registration. In British Columbia the disability to sue is expressed in this paragraph: "So long as any extra-provincial com-

pany remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit, or any other proceeding in any Court in the province in respect of any contract in whole or in part within the province in the course of or in connection with its business, contrary to the requirements of this part of this Act." Then in the Manitoba Act it is: " . . . And so long as it remains unlicensed under this part it shall not be capable of maintaining any action, suit or other proceeding in any Court in Manitoba in respect of any contract made in whole or in part within Manitoba in the course of or in connection with business carried on contrary to the provisions of said section 118." The section in the Ontario Act is practically the same. The Act expressly deals with capacity. It says: " shall not be capable."

VISCOUNT HALDANE: You say that is outlawing them. MR. WEGENAST: Yes, it is more than that; it is corporate death. If that were not the language I should still submit that that is the effect. Then in the Saskatchewan Act there is no provision to a like effect, but we assumed, and we think the authorities are in favour of our contention as they stand at present, that the effect of the Act if it were validly enacted would be to make the business illegal. I think I have already distinguished between making the contract illegal and the business illegal. The business at all events is illegal, and I submit unquestionably if the Act is valid whether the contracts made in pursuance of the business are legal or not,——

VISCOUNT HALDANE: There is nothing in Saskatchewan. MR. WEGENAST: No, excepting implication, which I submit there is. Then disability to hold land. May I mention at this point the point which I desire to raise later—Is the jurisdiction of the province in respect of the holding of land any greater than or any different from its jurisdiction over holding of personal property? I do not think Sir Montague Smith for a moment intended to lay down any different rule as regards land from what he did as regards personal property.

VISCOUNT HALDANE: I do not suppose he did. MR. WEGENAST: He showed an evident wish in his later judgment that he had not used that particular illustration.

VISCOUNT HALDANE: Supposing they levied succession duty or death duty, a corporation never dies, and therefore you may put a differential tax upon a corporation to make up for the absence of death duty. MR. WEGENAST: Yes. It is quite competent for the province to deal with regulation of the title of personal property.

VISCOUNT HALDANE: And real property too; if you legislate as regards all corporations alike. MR. WEGENAST: Yes, for instance the sale of goods. It is entirely competent to the province.

VISCOUNT HALDANE: You say it must apply to all corporations in the same way. MR. WEGENAST: No, with deference. I should not like to go so far as to say that. The Act does not treat them alike. This invites your Lordships to see whether there is not some ulterior purpose.

VISCOUNT CAVE: Here is a Mortmain Act which prevents a corporation from holding land without a license; they say in the case of a company which is registered we dispense with the provisions of the Mortmain Act. Does that entitle you to say if you do not register you still come under it? MR. WEGENAST: Has the province any right to give a privilege to its companies?

VISCOUNT CAVE: It is an exemption from the Mortmain Acts. I am not sure that it does not stand on a different footing from the other heading. MR. WEGENAST: Is it open to the province, to use the language of betting, to play any favourites?

VISCOUNT HALDANE: So long as under cover of that they do not strike at powers which are not theirs. MR. WEGENAST: What I invite your Lordships to do is to read into the Act both discriminatory treatment and ulterior purpose.

VISCOUNT HALDANE: The mere purpose does not matter; it is the character of the legislation. MR. WEGENAST: Yes, the discrimination as well, I submit.

VISCOUNT HALDANE: Let us look at it. Is there discrimination? MR. WEGENAST: Yes, I want to come to that.

VISCOUNT CAVE: You give the dispensation to all registered companies. Does that entitle you to say unregistered companies shall also get the dispensation? MR. WEGENAST: I am coming to that. I may say briefly but I hope your Lordships will not object to my developing it later, what we object to with respect to this item

as well as the others is that the province is trying to start its own companies off with a handicap over the Dominion companies, and the real and ultimate purpose of that is such as to deter incorporators going to the Dominion for their charter. That is one of the items. The provision in British Columbia is section 169: "No extra-provincial company required by this Act to be licensed or registered shall be capable of acquiring or holding lands or any interest therein in the province, or registering any title thereto under the 'Land Registry Act' unless duly licensed or registered under this or some former Act."

VISCOUNT HALDANE: What does it say as to a provincial company? MR. WEGENAST: I do not recollect that. I think it provides in the terms of the Imperial Act with power to hold lands. Following the Imperial Companies Act the British Columbia Act provides in an early section of the Act what will be the result of incorporation. Section 26 of the British Columbia Act, sub-section 2—this is rather important—says: "From the date of incorporation mentioned in the certificate of incorporation the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands"——

VISCOUNT HALDANE: Stopping for a moment, does that affect the Mortmain Act? A corporation always has power to hold lands except for the Mortmain Act, does it not in this country? There is no common law of mortmain here, is there? MR. WEGENAST: There are the old Statutes.

VISCOUNT HALDANE: There is no restriction of the power of a corporation to hold land at common law; it is purely statute. MR. WEGENAST: I think so.

VISCOUNT HALDANE: They were passed for the purpose of preventing the Church holding land. MR. WEGENAST: Yes, they go back to the Charter of Edward 3rd.

VISCOUNT HALDANE: The Mortmain Acts are very old Acts. MR. WEGENAST: Yes, I think the first one is in the Magna Charta of Edward 3rd, and they go on from there, and the latest compilation is the Statute of 52 Victoria. MR. WEGENAST: If that is so there is nothing that touches them and the general power to hold land is merely a right given to a corporate body as such.

VISCOUNT CAVE: Does that relieve this case from the Mortmain Act? MR. WEGENAST: Yes, that is what I was going to submit, that this is the section on which English companies rely to relieve them from the operation of the Mortmain Act.

VISCOUNT HALDANE: It may be you are right, but it is very odd that the power in a memorandum of association should repeal the Statute.

VISCOUNT CAVE: It is what the Statute says shall be the result. MR. WEGENAST: The Mortmain Act says itself "shall unless authorized by Statute," and this is the Statute which authorizes it. The Mortmain Act provides that land shall not be assigned to a corporation except under license from the Crown or by the authorizing of the Statute. This is the Statute which authorizes British trading companies to hold land.

VISCOUNT HALDANE: Supposing there is a Statute in the Province of British Columbia saying that no one is to hold land in mortmain without a license from someone, the province says the Dominion shall get it by registration. Is there anything objectionable in that? MR. WEGENAST: Not if the province does not try any favouritism.

VISCOUNT HALDANE: I was assuming that. That is just what I told you. MR. WEGENAST: If the province throws in the power to hold land, if it is an incident of its incorporation and the province says to the Dominion company you cannot hold land unless you pay the same fee as you have paid for incorporation——

LORD PARMOOR: What they say to the inter-provincial company, or the Dominion company is, as far as you have power to hold land you shall be free to hold land as a private individual. I do not want to go back to the general question of registration or license, but what is said in section 141 of the British Columbia simply. I do not want to go back to the general question. It is common enough here. MR. MOSS: It was held bad in British Columbia.

MR. WEGENAST: Yes, it was held bad in British Columbia along with the other sections of the British Columbia Act as we understood it.

VISCOUNT HALDANE: The memoradum of association of an English company under the last Act of 1863 contains the holding of its powers and defines the entirety of its incorporation capacity. It may well have been considered right to put in a power to hold land and yet the Mortmain Acts have been intended to be left intact.

VISCOUNT CAVE: They did not get behind the Mortmain Act. MR. WEGENAST: There is the Statute.

VISCOUNT HALDANE: What does the Statute say?

VISCOUNT CAVE: With power to hold land. On incorporation it becomes a corporation with certain capacities and powers, and with power to hold land. MR. WEGENAST: Yes.

VISCOUNT HALDANE: Under the Mortmain Act there is no difficulty about taking land. The difficulty was that you could not hold land. You could convey it to a corporation, but they could not hold it. MR. WEGENAST: I have examined the text books and I find that the uniform opinion is that this is the section which relieves trading companies from the necessity.

VISCOUNT HALDANE: The point that is in my mind is this: May not the general law of the province be that no corporation may hold land in mortmain without a license, and they put in this for their own company: "Every provincial company shall have power to hold land," and then they say to the Dominion companies, we have given a license to hold land to provincial companies and we will give it to you, but you must take out a license. MR. WEGENAST: That is just on the same question we are discussing. Could they do it with power to sue and be sued? They say, we give our own company power to sue and be sued as an incident of its incorporation. I am trying to point out that the land holding item is just one of the items that the company gets by virtue of its incorporation. What I say is that it is not competent to the province to hold out land as a bribe to incorporators.

VISCOUNT HALDANE: I do not know anything about holding out bribes. I should think they might hold out any bribes they liked to anybody. MR. WEGENAST: Perhaps I am putting it too strongly—an inducement.

VISCOUNT HALDANE: They could put up boards and say: Come and register under the Provincial Acts. Why could not the Government of Manitoba or Saskatchewan send round sandwich men saying: It is a great advantage to register under the Provincial Acts. MR. WEGENAST: That is the very essence of the case. If I fail in that I fail in everything in these cases.

VISCOUNT HALDANE: I do not know that you do. Why? MR. WEGENAST: Because that goes to status.

VISCOUNT HALDANE: You say, for instance: Margarine is much better made by our producers; come and buy margarine from the Government of British Columbia? Why not? MR. WEGENAST: As I understand my case it is ultimately a vital point.

VISCOUNT HALDANE: I do not see it. MR. WEGENAST: If the province is in a position to place that sort of handicap against a Dominion company——

VISCOUNT HALDANE: I should not be very much encouraged for your case if it depended on that proposition. MR. WEGENAST: It comes back to discrimination, if the province is entitled to discriminate.

VISCOUNT HALDANE: You may discriminate as long as you do not go beyond your powers. Why should not any body of people in any way make use of its machinery so long as it does not take away the Dominion powers? MR. WEGENAST: I invite your Lordships to carry into this enquiry the conception of status.

VISCOUNT HALDANE: I was always a little shy of your word "status," because I did not quite know what you meant by it. Now I begin to see how justified my suspicions were. Let us keep to powers. MR. WEGENAST: If that is so, then I must say it was an end of the incorporating power.

VISCOUNT HALDANE: How? MR. WEGENAST: My learned friend Mr. Nesbitt objects to me putting it that every lawyer in Canada knows so and so. I will put it in this way: that every good solicitor in Canada must advise his client that these Acts, if they are valid, place the Dominion company in exactly the same position as a group of incorporators contemplating incorporation under the Pro-

vincial Act. That is the very essence of my submission. It is not that the provincial legislation puts the Dominion company in the same position as a local company, but it puts the Dominion company in exactly the same position as a group of local incorporators, on their knees, if one may say so, before the provincial power, asking for corporate rights. That is the parity, and it is because of that parity which the Provincial Legislature seeks to impose on the Dominion company that I submit it goes to status.

VISCOUNT HALDANE: There is nothing sacred about a Dominion company. Why should not the Government of, we will say, Manitoba, if it is so disposed, say they are monstrously pressed by this power of the Dominion, or this claim to the Dominion to come with its companies into our region, and:—We will do everything which the law allows us to do to make it difficult for the Dominion company to come in? Why should it not do that, and hold a general election, as I have known general elections in Canada on larger questions and other questions? I remember legislation in Ontario in order to deter people from carrying on the business of selling liquor, and there was an Act of Parliament that no public household be built without windows extending down to the ground so that the good people of the street might see who were in there drinking. I remember the provision being impeached at the Bar here, but never successfully. MR. WALLACE NESBITT: It was actively condemned at the Bar that they were looking in. Your Lordships will remember the Rivers and Streams Bill; there was an actual election held. That was with regard to the right of damming.

VISCOUNT HALDANE: Was that a Dominion Act? MR. WALLACE NESBITT: No, it was a Provincial Act.

VISCOUNT HALDANE: It was a Provincial Act which made the large windows, was it not, because the province thought it could do no more. In order to prejudice people drinking under Dominion powers they enacted that there should be enormous windows so that everybody drinking at the bar should be in view of people in the street. That is my recollection. MR. WALLACE NESBITT: That is it.

VISCOUNT HALDANE: We have nothing to do with prejudice or preference, or anything of that kind; we have only to do with powers. MR. WEGENAST: I want to refer your Lordships to quite an unabashed piece of advertising in an official document issued by the Government, the last one.

VISCOUNT HALDANE: Nothing matters except powers. MR. WEGENAST: It was only as bearing on the purpose of this legislation.

VISCOUNT HALDANE: Have they the power to place the Dominion at a disadvantage? MR. WEGENAST: No, I say they have not.

VISCOUNT HALDANE: If they have not the power, why should not they do all they can to come as near to it as they can? MR. WEGENAST: Of course I quite agree. I am arguing that they have not the power to do that very thing; they have powers to put the Dominion company in the same position as local incorporators seeking incorporation.

VISCOUNT HALDANE: I am not perfectly certain about that. MR. WEGENAST: It is my submission. Is not that what was done in the John Deere Plow case? Did not they put the Dominion company in exactly the same position as a group of local incorporators with their proposed name and all?

VISCOUNT HALDANE: No, what they said was you cannot have the powers of the local incorporators. MR. WEGENAST: They say that to the local incorporators. The local incorporators cannot arrogate to themselves corporate status, and there are direct prohibitions in the Act. I pointed your Lordship's attention to the provisions in the Saskatchewan Act prohibiting persons, more than a certain number, 20 I think, assuming to act as a corporation. This is the purpose of these corporation laws, surely, my Lord, to control the assumption of corporate status.

VISCOUNT HALDANE: Why not, so long as you do not say to the Dominion company you shall not use your powers in this province. MR. WEGENAST: I was endeavouring to carry with me the idea of incorporation itself, incorporation meaning, as I submitted it did, the conferring of certain powers, items of powers, includ- limited in that way?

VISCOUNT HALDANE: These are not implied in incorporation, they are added to the capacity of incorporated companies. MR. WEGENAST: My Lord, was not

it held in the John Deere Plow case that the word incorporation should not be limited in that way.

VISCOUNT HALDANE: No, no, what we held in the John Deere Plow case was that incorporation did not mean merely the metaphysical status of being like a living person. MR. WEGENAST: It meant actual powers.

VISCOUNT HALDANE: Actual vitality and power, yes. MR. WEGENAST: Power to hold personal property.

VISCOUNT HALDANE: Whatever was added. MR. WEGENAST: Power to sue and be sued. The Provincial Legislature says to the Dominion company: Yes, we will put you in exactly the same position as a group of incorporators who wish to do that under our Act.

VISCOUNT HALDANE: Why not say that to the group of incorporators in the province? MR. WEGENAST: If they said that to group of incorporators in the province I should not object. If they put us on a parity with the provincial company, we would offer no objection, but they put us on a parity with a group of incorporators not as yet incorporated; that is the essence of the offence.

VISCOUNT HALDANE: Unless you can show that they took away some power that the Dominion has given you. MR. WEGENAST: They took away everything except the mere disembodied spirit.

VISCOUNT HALDANE: Did they? If they pass a law applying to all corporations in the province, how can you complain? MR. WEGENAST: They did not; they pass a law which exempts their own corporations.

VISCOUNT HALDANE: Let us follow that out. We are dealing with holding land? MR. WEGENAST: Yes, they give their own companies in British Columbia power to hold land.

VISCOUNT HALDANE: Every extra-provincial company requires a license. MR. WEGENAST: That excepts the local company. I have pointed out in section 26 the local company gets this power to hold land.

VISCOUNT HALDANE: By registration. MR, WEGENAST: By registration, but that power is denied to those companies.

VISCOUNT HALDANE: Not if they register.

LORD PARMOOR: Does not it all come back to this. Suppose the province can say: There is an open register, we ask you to register, may not they impose reasonable penalties if registration is not done. It all comes back to the method of enforcing registration, if registration in itself is allowable under those conditions. MR. WEGENAST: If the proviso were this, if these land-holding sections were isolated from the Companies Act, if they were in a separate Act dealing with the evil of holding land in the dead hand, the same end could not be attained without disclosing the discrimination at once; the Land Holding Act would have to say this Act applies to all except local companies, locally incorporated.

VISCOUNT HALDANE: Why? The Land Holding Act is simply to that extent something to take the place of one of these provisions. The Act says: Nobody is to hold land in mortmain without a license. The company could say: Any company registered shall be deemed to have a license, to have power to hold land. Then they say to the Dominion company: If you register you shall have power to hold land. Why is that differentiating? MR. WEGENAST: May I illustrate it in this way? A child is born of Chinese parents in British Columbia; that child has power to hold land by reason of his being born in British Columbia, let us say. Then the British Columbia Legislature passes an Act saying that all persons of Chinese origin shall be entitled to hold land on payment of a fee of $500; that is the sort of legislation that has been attempted over and over again in specific provinces. Would not the same argument apply? It would be said at once you are placing a handicap against this Chinese child. If that province said that all persons must pay a fee of $500 before they can hold land, then that discrimination would not be disclosed; there would be no discrimination.

VISCOUNT HALDANE: It might be discrimination on the principle of Bryden's case. MR. WEGENAST: That is my argument, that is the discrimination of it. What my submission is, the Chinese child gets his status to hold land, or his power to hold land, by reason of his birth in the province, and to place a further handicap against it is at once disclosing the ulterior object. It is the same thing

with these companies; one company is born in the province, or two are born in the province, one with a Dominion charter and one with a provincial charter, and the province says in its Land Holding Act, our provincial company can hold lands because it is born herein, but the Dominion company, being of different origin, must comply with certain requirements.

VISCOUNT HALDANE: Did we deal with this specifically in the John Deere Plow case; we referred to it? MR. WEGENAST: Your Lordship referred to it.

VISCOUNT HALDANE: I do not think we dealt specifically with this provision. MR. WEGENAST: Well, the section is mentioned as amongst those that made up the sum total. I must admit that the question of land holding brings into greater prominence the whole issue, but I do wish, if I may do so without labouring that, to carry this constantly in mind, that the power to sue and be sued is no less a provincial power than the power to hold land; it is no less within the provincial jurisdiction, and if I pursue the matter of the power to hold land it simply is a discussion of one of the items of power, the sum total of which constitutes incorporation, or if one may say so, constitutes the company's status. The British Columbia Act gives its own companies their powers and then states: "No extra-provincial company required by this Act to be licensed or registered shall be capable of acquiring or holding lands or any interest therein in the province, or registering any title thereto under the 'Land Registry Act,' unless duly licensed or registered under this or some former Act. Then section 141 goes on to provide that "An extra-provincial company licensed or registered under this or some former Act may sue and be sued in its corporate name"—that is a matter of suing and being sued, and further: "May acquire and hold lands in the province by gift, purchase, or as mortgagees or otherwise, as fully and freely as private individuals, or otherwise alienate the same." Then the provision in Manitoba goes deeper: "No company, corporation or other institution not incorporated under the provisions of the Statutes of this province, shall be capable of acquiring, holding, mortgaging, alienating or otherwise disposing of or lending money on the security of any real estate within this province, unless under license issued under any Statutes of this province in that behalf." It uses the word capable again. Then in Ontario the provisions requiring the holding of land are contained in a separate Statute which points to a consolidation of the pre-existing legislation, but if anything turns upon it I am prepared to argue that it was new legislation.

VISCOUNT HALDANE: How can anything turn upon it? Supposing there was a Mortmain Act in Ontario, all Ontario does is, it gives its license in two ways, by merely registering in Ontario or by taking a license out. That is all you get. MR. WEGENAST: I say it is not a Mortmain Act. It is an Act dealing with corporate status, and I fail unless I establish that. It is part of a legislative scheme.

VISCOUNT HALDANE: Mortmain Act deals with status. It prohibits a corporation from holding land. MR. WEGENAST: Its primary object is to prevent land from being held in the dead hand, and not to do with status.

VISCOUNT HALDANE: From being held at all by a corporation? MR. WEGENAST: That is its pith and substance.

VISCOUNT CAVE: I think under Manitoba it might have been well to add a reference to section 113.

VISCOUNT HALDANE: What is that, Lord Cave?

VISCOUNT CAVE: The Manitoba Act provides: "The powers of any corporation, licensed under the provisions of this part, with respect to acquiring and holding real estate, shall be limited in its license to such annual or actual value as may be deemed proper. MR. WEGENAST: I think that is probably dealt with later under limitations of powers.

MR. MOSS: It appears later under conditions attached.

VISCOUNT CAVE: It is rather material to this part. MR. WEGENAST: Carrying in mind at the same time that the same power would apply to personal property, I do not propose to submit anything that would not apply equally to the holding of personal property. I submit that the two things must remain on exactly the same footing throughout, unless indeed, my Lords, the Mortmain laws are intended to conserve the ultimate interest or fee of the Crown in land, the feudal or allodial fee.

LORD PARMOOR: Assume apart from the Mortmain Act the Dominion Act has given certain powers to the company to hold lands, all that is done here is to say that you may exercise those powers in Manitoba or any other province in your own interest. MR. WEGENAST: Yes, my Lord.

LORD PARMOOR: It may be that the conditions of registration are wrong. I do not say anything about that, but that is all that this Act says. There is no other disadvantage of any kind. Register, and then whatever powers you have holding land, there they are, and you can exercise them anywhere you like.

MR. WEGENAST: Not in Manitoba, my Lord, but subject to that. In Manitoba they do restrict.

LORD PARMOOR: Yes, but that is the general principle. MR. WEGENAST: That may be so, my Lord. Then, of course, the objection is to the registration, and the terms of it: requirement of registration. It comes back to the requirement of registration, and one always has this in mind that railway companies and banks in Canada, whatever opinion your Lordships now hold on the point, have never been considered for the moment as being subject to these Acts. It was always considered that they had their power by virtue of Dominion authority.

VISCOUNT HALDANE: Do you mean to say they do hold land without mortmain? MR. WEGENAST: Yes, my Lord, it has never been thought of asking them for a license in mortmain.

VISCOUNT HALDANE: Is there any case about their titles that has ever come before the Courts? MR. WEGENAST: They have come before the Registrars of Titles, and it has been the practice of the registrars of land titles in Manitoba and Saskatchewan to register the Dominion railway companies without question.

VISCOUNT HALDANE: Without any license in mortmain? MR. WEGENAST: Yes, my Lord, but it is the practice in Manitoba to refuse to register the title of the company with the Dominion charter not holding a provincial license.

LORD PARMOOR: Has not a Dominion company statutory powers to hold land like a company has here? You would not want a license. MR. WEGENAST: Well, it has it under our Dominion Companies Act.

VISCOUNT HALDANE: It may be it is so inherent in the essence of the railway company to hold land that it is within the powers of the Legislature with regard to railway companies to give them power *prima facie* to hold land as a right which is within the province.

VISCOUNT CAVE: Section 29 of the Dominion Act: "The company may acquire, hold, mortgage, sell and convey any real estate requisite for the carrying on of the undertaking of the company." MR. WEGENAST: Yes, my Lord. That is the Companies Act under which we operate, and I pointed out at the beginning of the argument, perhaps prematurely——

VISCOUNT HALDANE: That is not quite enough, because that may only go to capacities. It might still leave the provisions of the general Mortmain Act applicable. MR. WEGENAST: We argue that it goes further than status and gives us power if there is any distinction between having a status and having power—the two terms are not co-ordinate, of course——

VISCOUNT HALDANE: You trench then straight on to property and civil rights. MR. WEGENAST: Yes, as we have a right to do. I do not think it is deniable that the province must give us enough land for a head office. It must give us a right to occupy enough land for a head office whether under a lease or in fee; just as the province must give us the right to hold personal property we intend to trade in. It is the same question surely, my Lord.

VISCOUNT CAVE: Does the Mortmain Act prevent a corporation from occupying an office? MR. WEGENAST: Yes. We are restricted in Ontario from occupying the lands under the leases.

VISCOUNT CAVE: Does the Mortmain Act prevent a corporation from occupying an office? MR. WEGENAST: It is claimed that it does; we are enjoined by the judgment. The judgment against us holds that it does. The judgment restrains us from even occupying lands. The Mortmain Act of Ontario applies to leases as well as freeholds. Even in the judicial expressions the Judges have guarded themselves by saying it is not really a Mortmain Act, but only so-called. Now it comes back to this very same thing as to whether the province can require

registration as a condition. In any event if the provincial legislation is valid we have to wait for a few days before we get any land to hold our meetings.

Now, my Lord, I want, if I may, to give the obverse side so as to avoid any implication that I want to go too far with that argument. The province could pass legislation like that in section 26 of the Ontario Companies Act——

VISCOUNT HALDANE: Are you still on the power to hold land? MR. WEGENAST: Yes, my Lord. I want to show what under my argument the province could do. Section 26 of the Ontario Companies Act which is before your Lordships in that blue cover is the kind of legislation which I say the province could pass as mortmain legislation. And it will put my argument at once in relief if your Lordships will refer to that.

VISCOUNT HALDANE: Is that the extra-provincial? MR. WEGENAST: No, my Lord, the real Companies Act in Ontario which is bound along with it. It is in the first part of the blue covered book, my Lord. At page 13 of the Ontario Companies Act, section 26, there is a section providing that: "Unless other special statutory enactments apply, any land or interest therein at any time acquired by the corporation and not required for its actual use and occupation for the purposes of its business, or not held by way of security, shall not be held by the corporation, or by any trustees on its behalf, for a longer period than seven years after the acquisition thereof, or after it has ceased to be required for its actual use and occupation or for the purposes of its business, but shall be absolutely sold and disposed of, so that the corporation shall no longer retain any interest therein unless by way of security."

LORD PARMOOR: You find that in every old private Bill and Legislation Act in this country in those terms. MR. WEGENAST: I submit that is the sort of legislation that Sir Montague Smith had in his mind as being competent to the province. That is aimed at the evil of corporate holding of land. It is not aimed at denying the powers of a Dominion company *qua* company. In Ontario, my Lord, as I have said, the Mortmain Act purports to be a consolidation of older legislation. My submission is that it is *in pari materia* with the Companies Act, and is to the same effect as the corresponding sections of the Manitoba Act. I submit that the scheme of placing the Dominion company under this disability if invalid is no more valid when split up into two or three Statutes than when it is contained within the covers of one Statute. That is my submission on that point. If I may finish with the Saskatchewan Act, it is in the same terms as the Imperial Act. Simply the phrase with power to hold lands. Then that is simply one of the items of power which the company is denied until it is registered. Manifestly it could not hold lands any more than it could buy and sell goods. That is all comprehended I submit within the phrase "carrying on business."

If your Lordship should be of opinion that the power to hold lands stands on a different basis from the power to hold personal property and sell and deal in personal property, then I submit your Lordships would have to go into the question whether the ultimate fee in the land, assuming that your Lordships think that the power of the province to control the holding of land in Mortmain is intended to conserve this ultimate fee in the land, then your Lordships would have to examine the question whether the ultimate fee in Manitoba and Saskatchewan is in the province. I submit it is not.

VISCOUNT HALDANE: What have we to do with the ultimate fees here? MR. WEGENAST: If the object of Mortmain legislation is to conserve the reversionary interest of the Crown———

VISCOUNT HALDANE: It is not. My recollection of the Mortmain Act—it is a long time since I practised as a conveyancer—is this. You may convey to a corporation, but it cannot hold, and it reverts to the Crown. MR. WEGENAST: Well, my Lord, the recital———

VISCOUNT HALDANE: Not in virtue of any estate which was originally in the Crown, but in virtue simply of the Act which says so. MR. WEGENAST: I was going to submit that it should not be necessary for your Lordships to go into those questions, because the matter of holding land is on no different basis from the matter of holding personal property, but if your Lordships should not be of that opinion, then I submit it is necessary———

VISCOUNT HALDANE: What good would it do you if it did? All land in the province is in the Crown in right of the province, unappropriated land. MR. WEGENAST: Not in Manitoba and Saskatchewan.

VISCOUNT HALDANE: You say not in Manitoba and Saskatchewan? MR. WEGENAST: No, my Lord.

VISCOUNT HALDANE: They are surely both set up as provinces under the British North America Act. MR. WEGENAST: Not in that sense, my Lord.

VISCOUNT HALDANE: You surprise me very much. Where is the section in the Dominion Act which puts the title of the land in the province? MR. WEGENAST: The Crown lands in Saskatchewan and Manitoba are held in the right of the Dominion.

VISCOUNT HALDANE: There may be, of course, Crown lands—Indian lands, for instance—as to which there is a Statutory provision, but all I can say is that the general character of the distribution of powers between the Crown and the province, between the Dominion and the province in Canada, is that there is a common Crown advised by different Ministers, but that the titles to the land of Canada were not appropriated as in the Crown, and it is in the Crown in the right of the province, where it is not expressly conferred on the Dominion. MR. WEGENAST: Yes, my Lord, but I may still succeed in carrying on the Saskatchewan and Manitoba cases on that point.

VISCOUNT HALDANE: We are not dealing with the Crown lands here. MR. WEGENAST: But, my Lord, we are not dealing with the power to pass Mortmain legislation.

VISCOUNT HALDANE: That has nothing to do with it. The Crown is entitled to the land and the whole question is: Is the Crown advised by the Government of the province or the Government of the Dominion in exercising that right of property? Of course, if there are Statutes saying that something is Crown land and given to the Dominion in right of the Dominion that is another matter. You have something of the kind in the case of the Indian Reserves, but generally speaking land is in the Crown in the right of the province. MR. WEGENAST: Yes, generally speaking, in case it should come up as important in your Lordships' mind, would your Lordships take a reference to the passage in Lefroy dealing with the matter?

VISCOUNT HALDANE: Well, you just read what Lefroy says. MR. WEGENAST: He says in effect what I have said.

VISCOUNT HALDANE: But I would like to hear just what he says, Mr. Wegenast. MR. WEGENAST: In a note to page 708, he says, referring to section 109 of the British North America Act———

VISCOUNT HALDANE: Which is a special section. MR. WEGENAST: "This section, of course, applies *mutatis mutandis* to the other provinces admitted into the Union since Confederation, other than Manitoba, Albert and Saskatchewan, where the public lands are still retained by the Dominion."

VISCOUNT HALDANE: Just show me the provision in the British North America Act or any subsequent Imperial Statute under which that is so, because it is a very extraordinary proposition. It is not a question of conveyancing. There is only one Crown in Canada for the province and the Dominion—and only one Crown for the Empire. The title to the public land is vested in that, and the only question is what set of advisers advises it. If you could show me that there is a provision that the Crown is to be advised by someone else than the Govrenment of this province, well and good. If that is only a provision that certain public lands are to be invested in the Crown by the right of the Dominion, that is a different matter. MR. WEGENAST: Yes, that is so, my Lord. The subject has been canvassed in Canada, and there are opinions both ways. I simply raise the point.

VISCOUNT HALDANE: Heaven forbid that we should have it argued here at short notice, but surely you can tell me if there is some provision in the British North America Act or in some other Imperial Statute saying that with regard to the Crown lands. MR. WEGENAST: The sections are set out here, my Lord.

VISCOUNT HALDANE: Perhaps Mr. Nesbitt may know something of this section. Is there such a section, Mr. Nesbitt? MR. NESBITT: No, my Lord. I think what my friend has in mind is this. These three provinces were carved out of what was known as Ruperts Land.

VISCOUNT HALDANE: Yes, out of the North-West Territory. MR. NESBITT: And the Dominion has claims that except so far as the area was granted, which would be all this area in dispute———

VISCOUNT HALDANE: Except so far as these provinces were carved out of the North-West Territory it would remain under the Dominion? MR. NESBITT: Yes, my Lord, that is how I understand it.

MR. WEGENAST: No, my Lord.

MR. NESBITT: Except so far as granted to the provinces.

MR. WEGENAST: I do not want to be too cavilier in dealing with my friend's argument.

MR. NESBITT: I am not going even to discuss this point, because I do not think it has any possible bearing on this case.

VISCOUNT HALDANE: I think there is a much more fundamental question here, which is: when the Provincial Government was set up and the land vested in the Crown, and which within the boundaries for that province, how can the Crown be advised by any other Government? MR. WEGENAST: It is the greatest issue as between the Western Provinces and the Dominion at the present day.

VISCOUNT HALDANE: Well, give me the section? MR. WEGENAST: It is section 21 of the Saskatchewan Act.

VISCOUNT HALDANE: Will you read me that section? MR. WEGENAST: "All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under the North-West Irrigation Act of 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads," and so on.

VISCOUNT HALDANE: It may be as regard these Crown lands and these waters, but I am talking of the general lands within the province? MR. WEGENAST: All that I am saying, my Lord, is that it is Crown lands—it is the Crown which grants the lands.

VISCOUNT HALDANE: I should like to know what the lands are. I should have thought that is certain reserved lands. Is there a definition of Crown lands there? MR. WEGENAST: No, my Lord.

VISCOUNT HALDANE: All the land in Canada is in the Crown. MR. WEGENAST: But in these three Western Provinces in the Crown in the right of the Dominion.

VISCOUNT HALDANE: There may be some restricted provisions in the Constitution of the province, but nothing you have read is in the least conclusive of it. That relates to Crown lands. Under section 109 of the British North America Act, surely Crown lands—— MR. WEGENAST: My argument may be put in this way. The patent in the case of lands in Manitoba, Alberta and Saskatchewan comes from Ottawa, from the Dominion Government—the patent for the land.

VISCOUNT HALDANE: Yes, for Crown lands. MR. WEGENAST: Every man traces his title back from the Dominion grant.

VISCOUNT HALDANE: No doubt, because he traces it back to the time when the North-West Territory was administered by the Dominion of Canada, but since the province has been set up, I should be very much astonished to hear that in the case of any ordinary land, which is subject to the disposition of the province, that there was any title by charter, which came from anybody but the Lieutenant-Governor on behalf of the Crown. MR. WEGENAST: It is so, my Lord. All the unoccupied lands in these three Western Provinces are subject to be granted out from time to time by the Dominion.

VISCOUNT HALDANE: You are telling me something I did not know, Mr. Wegenast, and something which is very astonishing to me. I am assuming this is land which is within the Province of Canada. It may be taken out like the Indian Reserves. MR. WEGENAST: No, my Lord, it is all the Crown lands.

LORD SUMNER: Is it section 21? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Crown lands? MR. WEGENAST: All the unoccupied lands are still held by the Dominion, and it is a burning question between the Dominion and each of these three provinces, the provinces urging constantly that

these Crown lands should be handed over to the provinces for administration and for sale, but there is no doubt as to the effect. If your Lordships were to want to take out a quarter section of land in Manitoba, your Lordships would have to apply to Ottawa.

VISCOUNT HALDANE: If it is what is called Crown land, but is there a definition of "Crown land"? MR. WEGENAST: It is all the lands which have not been granted by the Crown, which have not been taken.

VISCOUNT HALDANE: Is that the definition? MR. WEGENAST: I do not know that there is a definition, but I can say with confidence, however, that it is in fact done in that way.

VISCOUNT HALDANE: It is very extraordinary. You have set up a Government, and a new province, and you have taken away what has been the right of advising the Crown in respect of land within the boundaries of the provinces. MR. WEGENAST: Of course, my Lord, there are two sides to that question. It is a very heavy burden to administer these Crown lands, and the Dominion, of course, assumes the burden as well as the advantages. Now, my point is this. Supposing this land falls in, that is, supposing the title falls in, there is a reversion to the Crown. It may be that the Mortmain Acts are intended to protect that reversion. In the recitals to all the old Acts your Lordship will find the purpose was stated to be to protect the Lord of the fee from being deprived of his reversionary interest and perquisites.

MR. WALLACE NESBITT: Will it inconvenience you if I intervene for a moment. If your Lordships will look at a case in 1904 Appeal Cases, at page 799, in a case from the Supreme Court of Canada, the *Attorney-General for Manitoba* v. *Attorney-General for Canada,* your Lordships will see that deals with the question of swamp lands, but I think you will find that the lands which were vested in the Crown, namely, the Dominion, prior to the incorporation of the province, remained in it unless transferred by Order-in-Council.

VISCOUNT HALDANE: Yes, I was in that case too, but I had forgotten it. MR. WALLACE NESBITT: I had forgotten it also till your Lordship mentioned it.

VISCOUNT HALDANE: I was counsel for Manitoba apparently in that case. MR. WALLACE NESBITT: I had forgotten about it.

MR. WEGENAST: The only point I wanted to make was this, that if your Lordships had been of opinion that it was because these Acts were intended to preserve the right of the Crown to the reversion, in the case of failure of heirs, or whatever might be the cause of the reversion, whether forfeiture or otherwise, that if the purpose of these Acts was to protect that reversionary interest, then in the case of Saskatchewan and Manitoba the proper Legislature to pass Mortmain legislation would have been the Dominion.

VISCOUNT HALDANE: Well, it does not in the least follow because Mortmain arises from administration and not from property—the right of the Crown to forfeiture—— MR. WEGENAST: If that is concluded, then I need not pursue that subject any further; if it were not so, then I should like to pursue it as regards Saskatchewan and Manitoba, and to urge that the Dominion is the proper legislative body to pass Mortmain legislation for Manitoba and Saskatchewan.

LORD PARMOOR: Supposing the Dominion Act if carried out would be inconsistent with the Mortmain Act of the province, what is the position then? MR. WEGENAST: Your Lordship means if the Dominion Act were.

LORD PARMOOR: If the Dominion legislation as carried out in the province would be inconsistent with the local Manitoba Act, whatever it may be. MR. WEGENAST: Then if the Dominion legislation were enacted in the exercise of power under section 91, it would prevail undoubtedly.

LORD PARMOOR: We shall have to consider that. I am not doubting that case, but that would depend on how far you have to reconcile that with the civil rights of properties under section 92.

VISCOUNT HALDANE: That is, all ungranted or waste lands of the province shall be vested in His Majesty in right of the Imperial Government. You are so far right, but when land is conveyed to a company, is it ungranted land in any sense? MR. WEGENAST: Very often in Manitoba.

VISCOUNT HALDANE: But when it has been conveyed how can it be ungranted land? MR. WEGENAST: That may be so. It may be that the land having been conveyed by the Dominion Crown if it reverted at all would revert to the Provincial Crown.

VISCOUNT HALDANE: Or by any one else if conveyed to private parties with a perfect title to it. But it is still a Mortmain forfeiture to the Crown I should have thought. MR. WALLACE NESBITT: It instantly comes under the provincial power of legislation.

VISCOUNT HALDANE: There is nothing in what you have read so far which touches these waste or ungranted lands. I must say I am surprised. I did not till you satisfied me that there was any peculiarity about it. But it does not extend to lands which have been granted. MR. WEGENAST: If that distinction is made that may be so, but still I think it is not concluded by anything that has been said by the Legislature or the Courts that that land shall revert, if it did revert, to the Provincial Crown, and it may be, I think, possibly your Lordships might take the view that this legislation was intended to protect this reversionary interest, and if so, I was going to argue with regard to that. I had no right at all events to assume your Lordships would take the view that it was not intended for that purpose, and I had to be prepared to reckon with the question.

VISCOUNT CAVE: Was this point dealt with in the Colonial Building case? MR. WEGENAST: Yes, my Lord, I am coming to that.

VISCOUNT CAVE: Have you not already come to that now? MR. WEGENAST: Yes, my Lord, I have come to that really.

VISCOUNT CAVE: It seems to me to deal with that very point. MR. WEGENAST: I was going to say that, my Lord. If I may conclude my argument on that point in a sentence and then go on to the Colonial Building case. I was going to argue, if your Lordships took that view, that the province had the same reversionary interest in personal property, at least potentially—I do not know whether your Lordships follow me in that, but I was going to argue that the province had the same reversionary interest at least potentially in personal property as it has in real property. The province could say with regard to the property of any deceased person or any person that was to be penalized, say a person not having heirs, that the reversion should be to the Crown. It is just as competent to the province to say that in the case of personal property as it is in the case of real property, so that in that aspect no distinction can be drawn. It is just as competent to the province to deal with the personal property as with real property.

Now, my Lords, may I turn to the dicta of Sir Montague Smith in the case of the *Citizens Insurance Company of Canada* v. *Parsons,* and then in the Colonial Building case. At page 117 in the case of *Citizens Insurance Company of Canada* v. *Parsons,* which is reported in 7 Appeal Cases, I have abstracted a passage from that page: "Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in Mortmain, it could scarcely be contended if such a company were to carry on business in a province where the law against holding land in Mortmain prevailed (each province having exclusive legislative power over 'property and civil rights in the province'), that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion"—your Lordships observe the qualification—"for the sole purpose of purchasing and holding land."

VISCOUNT HALDANE: In the Dominion. MR. WEGENAST: Yes, my Lord, holding land in the Dominion "it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts."

VISCOUNT HALDANE: He says that. MR. WEGENAST: Yes, my Lord, his Lordship does not say if a company were incorporated for the purpose of carrying on trade and commerce. I am not carrying with me a real estate company.

VISCOUNT HALDANE: Unless under the powers of the Dominion they were entitled to carry on trade and commerce. That would have necessitated the holding of land by the railway company possibly. MR. WEGENAST: I submit it is necessary for the Dominion company to hold a certain amount of land.

VISCOUNT HALDANE: It is not essential. MR. WEGENAST: Then may I say occupying it. The banks have been considered to be in the same position as railway companies whatever the opinion may be worth. Banks are considered as having a power to hold lands by virtue of their Dominion incorporation.

MR. WALLACE NESBITT: Do not they take out a license of Mortmain? MR. WEGENAST: No, they do not.

MR. WALLACE NESBITT: Do you know that? MR. WEGENAST: Yes, I do know that.

MR. WALLACE NESBITT: I have never had it brought to my attention.

VISCOUNT HALDANE: I wonder whether any one has even taken any objection to the title of any land hold by a bank. MR. WALLACE NESBITT: I do not know whether they have or not.

MR. WEGENAST: As a matter of fact this whole question of Mortmain is of only academic importance in the Canadian provinces, because there is nothing to prevent the company from conveying the land. Mortmain Acts do not affect the capacity of a company either to acquire or to convey. They only affect the capacity to hold, and if the company can convey the land before the Crown gets its hands on it by way of forfeiture, a thing which has never been admitted in Canada, except in once case where the facts were well understood, then the Act does not come in.

MR. WALLACE NESBITT: Why do you say that? "Lands shall not be shared to or for the benefit of or acquired by" is the Ontario Act.

MR. WEGENAST: The penalty is forfeiture. The land will be forfeited to His Majesty.

VISCOUNT HALDANE: I do not think a person who is struck at by the Mortmain Act can make a title. He cannot hold. How can he convey land if he never had the title to hold it himself? MR. WEGENAST: I need not load myself up with that argument.

VISCOUNT HALDANE: No, perhaps not. MR. WALLACE NESBITT: You did not read the whole of it.

MR. WEGENAST: No, I will read the whole of it: "It would scarcely be contended if such a company were to carry on business in a province where the law against holding land in Mortmain prevailed (each province having exclusive legislative power over 'property and civil rights in the province'), that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body." Of course, that was the old exploded idea of simply having capacity and no power which the John Deere Plow Company case disposed of.

Now, my Lords, in the Colonial Building case, which is reported in 9 Appeal Cases at page 157, Sir Montague Smith reconsiders his former dictum, and I place considerable weight for the purposes of my argument on three passages in that judgment. The first one is at page 164: "Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the association was not lawfully incorporated." Your Lordships will remember that there the Attorney-General of Quebec brought an action to have it declared that the Dominion company which was incorporated for the purposes of buying and selling and dealing in land throughout Canada—that that company could not hold land in Quebec.

VISCOUNT HALDANE: Because of the Mortmain Acts. MR. WEGENAST: Yes, my Lord. "Although the observations of this Board in the *Citizens Insurance Company of Canada* v. *Parsons* referred to by the Chief Justice, put a hypothetical case by way of illustration only," and then there is a grammatical *hiatus* there, but the meaning is quite clear: "and cannot be regarded as a decision on the case there supposed." That is what he says in this case two years later.

MR. WALLACE NESBITT: Please go on and read the next sentence.

VISCOUNT CAVE: They adhere to the view. MR. WEGENAST: Yes, my Lord, they do. "Their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the

incorporation of companies"—but not the holding of land. He says: "We still hold the same view as regards incorporation of companies," but the illustration we used about the holding of land we did not intend as a decision.

VISCOUNT HALDANE: Perhaps you may go on again a little further. MR. WEGENAST: Yes, my Lord, I will read that passage. On page 166 your Lordships will see: "But the powers found in the Act of Incorporation"—that was the case before them—"are not necessarily inconsistent with the provincial law of Mortmain which does not absolutely prohibit."

VISCOUNT HALDANE: Will you just look at the top of page 166, beginning with the words: "It may be granted." MR. WEGENAST: Yes, my Lord. "It may be granted that, by the law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown. This law was recognised by this Board, and held to apply to foreign corporations in the case of the *Chaudiere Gold Mining Company* v. *Desbarat*. It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of section 92 of the British North America Act, namely, 'property and civil rights within the province.'"

VISCOUNT HALDANE: Now read the next sentence. MR. WEGENAST: "So that the Dominion Parliament could not confer powers on the company to override it."

VISCOUNT HALDANE: Yes, to override it. MR. WEGENAST: To override a real Mortmain law.

VISCOUNT HALDANE: To hold land notwithstanding. MR. WEGENAST: Yes, my Lord, but will your Lordship look at the next sentence; that is what I want to rely upon: "But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of Mortmain, which does not absolutely prohibit"———

VISCOUNT HALDANE: Yes, but go on still further. MR. WEGENAST: "Corporations from acquiring or holding lands, but only require, as a condition of their so doing, that they should have the consent of the Crown."

VISCOUNT HALDANE: That is very much against you, Mr. Wegenast. MR. WEGENAST: I am going on with the passage: "If that consent be obtained, a corporation does not infringe the provincial law of Mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person," and then there comes that passage expressing the idea of the Chief Justice of Ontario as to what incorporation means. We have gone much beyond that. Then he says: "Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land." We say this is not a law relating to the acquisition and tenure of land, but we say this is a law directed to placing the Dominion company———

VISCOUNT HALDANE: What is this? This is with reference to the acquisition or holding of land or any interest therein in the province. It is a law saying: no company not licensed can do that. MR. WEGENAST: My Lord, there are things which in one aspect fall under one head and legislation in another aspect which fall under another head. I am urging that this is in this connection, and in its real pith and substance, intended as corporation law, company law.

VISCOUNT HALDANE: It is intended to be what it says, that no company shall hold land without being registered. MR. WEGENAST: This is company law.

VISCOUNT HALDANE: That is general law. No corporation shall hold land unless it is registered, or the Crown has consented. MR. WEGENAST: That is my objection, my Lord.

VISCOUNT HALDANE: The provincial company has that power given to it in terms. MR. WEGENAST: If this were an Act standing by itself the discrimination would at once be disclosed.

VISCOUNT HALDANE: At any rate we see your point, Mr. Wegenast. MR. WEGENAST: Then on page 168, my Lords, His Lordship goes on with his comment on his previous dictum in the Citizens and Parsons case: "It should be observed that their Lordships in the case supposed in their judgment of the appeal

of the Citizens Insurance Company, in regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any province in which they sought to acquire it, had not in view the special law of any one province, nor the question whether the prohibition was absolute." Then at the top of page 169: "or only in the absence of the Crown's consent. The object was merely to point out that a corporation could not exercise its powers subject to the law of the province, whether it might be, in this respect." We go right back to the question whether it is a law of the province, and alongside it is the question whether the province could pass a similar law as regards personal property, and from that standpoint, my Lords, I submit that the case is absolutely conclusive in my favour. The province could not, I submit, pass an Act requiring the company to have a license or to register before it could hold personal property. It comes to the same question of the pith and substance of the Act again. Is this Act for the purpose of controlling and the holding of land by corporations, or is it the purpose of controlling the status of companies to hold lands, which is a different thing. If your Lordships should identify this legislation as being in essence mortmain legislation as it stands here in its context then, of course, that would be a categorical finding against me. But I submit it is only one item of a number of items going together to make up companies' powers.

Now, my Lords, proceeding with the examination of this comparison, the next item is the question of the refusal of or right to a license. In the British Columbia Act the provision in section 18(1) was that: "A company or society may not be incorporated nor may an extra-provincial company be licensed or registered by a name identical with that by which a company or society or firm in existence is carrying on business or has been incorporated, licensed, or registered, or so nearly resembling that name as in the opinion of the Registrar to be calculated to deceive, or by a name of which the Registrar shall for any other reason disapprove, except where such company or society or firm in existence is in the course of being dissolved and signifies its consent by resolution duly passed and filed with the Registrar, or except where an extra-provincial company licensed or registered, has ceased or is deemed to have ceased to carry on business in the province." Then the next subsection I think, my Lords, is what I had in my mind on Friday as being an amendment passed in 1913, after the John Deere Plow Company's case was launched.

VISCOUNT HALDANE: You take exception to the word "regulations" there. You are taking section 109 of the Manitoba Act now. MR. WEGENAST: No, my Lord. I was taking the British Columbia Act, section 18(1). The sub-section of the British Columbia Act, I think, was added in 1913, after the John Deere Plow Company's case was brought, so that, perhaps, it is not quite fair to bring it in here. I do not think it adds a great deal to the previous section, but it was much discussed in the argument as showing the sort of thing the province might do if it had control over the company as was proposed in this Act.

VISCOUNT HALDANE: Where does this go on to? MR. WEGENAST: It goes over to the other page, my Lord. Your Lordship will observe that there is a provision at the end: "Provided that this amendment shall not affect litigation now pending in regard to the name of any company."

VISCOUNT HALDANE: Yes. MR. WEGENAST: Now with regard to Manitoba— "A corporation coming within Class V. shall, upon complying with the provisions of this part and the regulations made thereunder receive a license to carry on its business and exercise its powers in Manitoba."

VISCOUNT HALDANE: You object to the word "regulations" there. MR. WEGENAST: Yes, my Lord.

VISCOUNT CAVE: Is there a power to make regulations? MR. WEGENAST: Of course we place nothing or very little, my Lord, on these provisions in their isolated positions.

VISCOUNT CAVE: Have you found a power to make regulations in Manitoba? MR. WEGENAST: No, my Lord, I have not. I know they do make regulations, but whether they have the power to do so or not I do not know.

MR. WALLACE NESBITT: There are none in the record. MR. WEGENAST: The fees are there; they are provided by the regulations.

VISCOUNT CAVE: It would be by some slip in consolidating the Statutes I suppose that they have left out the part. MR. WEGENAST: I think so, my Lord, because in every other province there is that power to make regulations. Then in Ontario there is a corresponding provision: "A corporation coming within class 7 or 8 shall, upon complying with the provisions of this Act and the Regulations, receive a license to carry on its business and exercise its powers in Ontario;" but in section 10 it is provided that "The Lieutenant-oGvernor-in-Council may make regulations which shall be published in the Ontario Gazette requesting: the evidence required," and so on. That brings us to a regulation. Then in the case of Saskatchewan——

VISCOUNT CAVE: Before you pass from that, the power to make regulations, as to the evidence required to enable the Lieutenant-Governor to make this regulation with regard to the name—— MR. WEGENAST: He purported to do so.

VISCOUNT CAVE: So I understand. MR. WEGENAST: Of course he does not come in in this case.

VISCOUNT CAVE: No; but it might assist us in comparing this Ontario Act with the British Columbia case. MR. WEGENAST: Yes, my Lord.

VISCOUNT CAVE: I should have felt some difficulty as to whether the power to make regulations as to the evidence required by legislation would quite cover this regulation. MR. WEGENAST: There might be a question there, my Lord.

VISCOUNT CAVE: However, you have nothing more to say about that. MR. WEGENAST: No, my Lord.

MR. WALLACE NESBITT: Will it divert your argument, Mr. Wegenast, on that if I say this. Your Lordship has the point at page 33 of M. We say the only regulations applicable to Dominion companies are to be found at page 33, and that the others with reference to the extra-provincial corporations apparently I should fancy were probably some old regulations prior to the amendment of the Statute. That seems to me to be the only way of accounting for them in here.

VISCOUNT HALDANE: There is no statutory power. MR. WALLACE NESBITT: No, my Lord, and they have got this expressly relating to Dominion companies only.

VISCOUNT HALDANE: It is quite possible that in that case of Ontario at all events there was power in the old Governor of the old united provinces which was held to have been transmitted to the Lieutenant-Governor of Ontario under that section which related to the distribution of executive powers. MR. WALLACE NESBITT: Section 75, my Lord. I do not propose to support any such regulation as that for a moment, so that that may go by the Board.

MR. WEGENAST: At page 32 it is quite plain that the Dominion companies are included in the regulations with respect to extra-provincial licenses in general. The provisions on page 31 with regard to the licenses in mortmain in any event contain the requirement that evidence shall be produced that the corporate name of the corporation is not on any public grounds objectionable and so on.

VISCUNT HALDANE: You say that as to what the name of the corporation should be is for the Dominion. MR. WEGENAST: Yes, my Lord.

MR. WALLACE NESBITT: I agree. There is no argument about that.

VISCOUNT HALDANE: You do not contest that. MR. WALLACE NESBITT: No, my Lord.

VISCOUNT HALDANE: You say the Dominion may say this corporation is to have such and such a name. MR. WALLACE NESBITT: Yes, my Lord, and we cannot touch it.

VISCOUNT HALDANE: Then that relieves you, Mr. Wegenast. MR. WEGENAST: Then I can carry with me the Saskatchewan Act which expressly purports to deal with the name in section 129.

VISCOUNT HALDANE: That applies to all of them. You concede, Mr. Nesbitt, that the Dominion may prescribe any name it likes. MR. WALLACE NESBITT: Yes, my Lord. As a matter of fact this is decided by the John Deere Plow Company's case, so that it is no use discussing that matter any further.

MR. WEGENAST: In section 120 of the Saskatchewan Act——

VISCOUNT HALDANE: I think that is very much covered by the John Deere Plow Company's case, Mr. Nesbitt. MR. WALLACE NESBITT: Yes, my Lord. The province thought they had the right under administration of justice. It would have to come under passing off of goods if there was no name.

MR. WEGENAST: In section 129 of the Saskatchewan Act your Lordship will see this.

VISCOUNT HALDANE: You are relieved on this Mr. Wegenast, in regard to your argument. MR. WEGENAST: Then, my Lord, I must carry the appeal in the Saskatchewan case because if we were not to become subject to this sort of legislation they had no right to ask us to register.

VISCOUNT HALDANE: It may be you had to register for mortmain. MR. WEGENAST: Yes, my Lord, but in order to do that we would have to turn to the whole Act.

VISCOUNT HALDANE: I do not know. We hinted in the John Deere Plow Company's case that in order to see that you behaved yourselves properly as ordinary citizens you ought to make returns, and so forth. MR. WEGENAST: Yes, and I think your Lordship also said, not in the judgment, but it was very much before wour Lordship in the argument, that if the Act contained conditions which were inconsistent with the proper exercise of our powers under the Dominion then the province could not ask us to comply with these conditions or requirements.

VISCOUNT HALDANE: Let me have that again please. MR. WEGENAST: If the Act contained conditions or requirements which were inconsistent—the observance of which was inconsistent with our rights under the Dominion Act—then the province could not ask us to comply with these requirements.

VISCOUNT HALDANE: Nataurally. MR. WEGENAST: But by accepting a charter from the Saskatchewan Government under this Act we would bring ourselves under the Saskatchewan jurisdiction.

VISCOUNT HALDANE: You cannot make anything legal which is illegal. You cannot make things *intra vires* of the province by merely consenting to them. MR. WEGENAST: I thought it was at least arguable that by accepting these powers from the Saskatchewan Government under the Local Companies Act we would bring ourselves voluntarily within this section of the Saskatchewan Act.

VISCOUNT HALDANE: I do not know what bargain you might make, but you could not do anything which would alter the distribution of powers under the British North America Act. MR. WEGENAST: No, my Lord, but really is not this a fact, that it is the voluntary action of a group of shareholders, let us say, which determines whether the company falls under section 92 or section 91?

VISCOUNT HALDANE: No, it is the corporation which is a separate entity. MR. WEGENAST: I mean it is open to the incorporators to go either to the province or to the Dominion for their charter. If they go to the Dominion for their charter they put themselvxes under the Dominion law.

VISCOUNT HALDANE: They cannot go either to the one or to the other. They can go to the one for provincial purposes and to the other for non-provincial purposes. MR. WEGENAST: We are in this position in Canada that the province and the Dominion are competing for this very business.

VISCOUNT HALDANE: So much the more difficulty for those who have to advise on the matter. MR. WEGENAST: Yes, that is so, my Lord, of course.

VISCOUNT HALDANE: You can go to the province and accept a charter for provincial objects, and that is all that the province can do. They have no power at all to make a grant to you of power for non-provincial purposes. MR. WEGENAST: But they purport to do that very thing, my Lord.

VISCOUNT HALDANE: So much the worse.

VISCOUNT CAVE: What is your complaint of section 129? MR. WEGENAST: Not with regard to these companies, my Lord, but I say the province purports to deal with the name.

VISCOUNT CAVE: It only requires you to use the word "Limited" as part of your name. MR. WEGENAST: There are a great many companies in Canada that have got the word "Limited" after their name.

VISCOUNT CAVE: But you are compelled to do that by the Dominion law?

MR. WEGENAST: No, my Lord. I think I can satisfy your Lordship in a moment on that.

VISCOUNT HALDANE: But your company is a limited company? MR. WEGENAST: Yes, my Lord, but I do contend that the province does deal with the names. I did preface what I said by saying it did not affect our particular company. But there are a considerable number of companies in Canada which have not the word " Limited " just like the Hudson's Bay Company for instance. Could the province ask the Hudson's Bay Company to put the word " Limited " after its name? MR. WALLACE NESBITTS The Hudson's Bay Company would not come within this Act.

MR. WEGENAST: Yes, it does in terms come within the Provincial Act.

VISCOUNT HALDANE: I do not see why the province should not say " Every corporation which has a limited liability must say so in trading "; that is to say, it must use the word " Limited " in its name. MR. WEGENAST: My general argument there is that when it comes to the question of trading with or without the name " Limited " the Dominion surely is the proper legislative body.

VISCOUNT HALDANE: I am not at all sure about that. I think there are civil rights. MR. WEGENAST: I would urge that it was a matter of incorporation and trading.

VISCOUNT HALDANES No, not necessarily incorporation at all. They might say you are to put up a green flag for instance above your building to show to everyone you deal with that they are dealing with a limited liability company. Why not? If you can do that then why not put the word " Limited " after your name? MR. WEGENAST: If the word " Limited " why not also in the John Deere Plow Company's case?

VISCOUNT HALDANE: That was different. That was the proper name of the company. This is general legislation to the effect that everyone who is dealing with a limited liability is to say so. MR. WEGENAST: We have two legislative bodies in Canada, and it is as reasonable to suppose that the Parliament of Canada would enact proper legislation as the province. There is no inconvenience.

VISCOUNT HALDANE: That is not the British North America Act. It is dealing with distribution of powers. Civil rights are given you by the province, and you must construe the expression " civil rights." Still it does not give civil rights *prima facie*. MR. WEGENAST: Yes, my Lord. Then there is the question of the refusal to license.

VISCOUNT HALDANE: I think we had better adjourn now.

(Adjourned for a short time.)

MR. WEGENAST: In British Columbia, my Lords, it was provided " that any extra-provincial company duly incorporated under the laws of the Dominion amongst others duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority or Legislature extends, may obtain a license from the Registrar authorizing it to carry on business within the province on complying with the provisions of this Act, and on payment to the Registrar in respect of the several matters mentioned in the Table B in the first schedule thereto the several fees therein specified, and so on, subject to the provisions of the charter and regulations of the company and to the terms of the license "—that is the vital port—" thereupon have the same powers and privileges in the province as if incorporated under this Act."

VISCOUNT HALDANE: You say that goes too far; you say that conflicts. MR. WEGENAST: Yes, my Lord; not only because it says subject to the conditions of the license, but because it says that after getting this license we have only the powers of a local company. Now your Lordship suggested this morning that the powers which a Dominion company gets from the Dominion are a different thing from the powers which a local company gets under a local charter; if that is so, then it follows mathematically that this Act, and any other Act like it, offends in taking away the Dominion powers and giving back local powers.

VISCOUNT HALDANE: Yes. MR. WEGENAST: Of course I am free to admit that in Canada there is a disposition to regard the powers as being about the same;

that is to say, my Lords, if a company has a charter, under the Provincial Companies Act, to carry on a certain business, if under the *Bonanza Creek* case it can get ancillary powers in every other of the provinces, and if no other jurisdiction in the world objects to its exercising its powers in the other jurisdiction, then there is a disposition to think in Canada that it is on the same basis as a Dominion company.

VISCOUNT HALDANE: I think we see your point. Now Manitoba "shall be limited in its license to such annual value or actual value as may be deemed proper." You say that is differentiating? MR. WAGENAST: Yes, my Lord.

VISCOUNT HALDANE: Stop a little: "Any corporation licensed under the provisions of this part"; does that refer to provincial companies as well, or is that confined? MR. WEGENAST: That is confined to the extra-provincial companies.

VISCOUNT HALDANE: That is confined to extra-provincial companies? MR. WEGENAST: Yes.

VISCOUNT HALDANE: Do you agree that that is so, Mr. Nesbitt? MR. WALLACE NESBITT: No, my Lord, I do not.

MR. WEGENAST: Then I shall have to demonstrate it, my Lord.

VISCOUNT HALDANE: We must look at section 113. MR. WALLACE NESBITT: Yes, my Lords, I think that is right.

VISCOUNT HALDANE: You think Mr. Wegenast is right? MR. WALLACE NESBITT: Yes, under this part.

VISCOUNT HALDANE: We had better just verify it. You see it says corporations requiring license. MR. WALLACE NESBITT: 106 would seem to settle that.

VISCOUNT HALDANE: Within 5 of 108; it comes within clause 5. MR. WALLACE NESBITT: It excludes local companies.

VISCOUNT HALDANE: Under this part. Just let us see to what this part refers. Yes; that refers to extra-provincial corporations. MR. WALLACE NESBITT: Yes, 106 seems to settle that.

VISCOUNT HALDANE: Yes. So that is your point. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: There is a differentiation. MR. WEGENAST: Yes; but my friend Mr. Asquith points out that he omitted to put in his list section 111, which is like the other section of the British Columbia Act. May I ask your Lordshops to refer to the Manitoba Act, section 111.

VISCOUNT CAVE: That is the one on which the question of consideration arises? MR. WEGENAST: Yes, my Lord, but it does provide that the company, on being——

VISCOUNT HALDANE: I see I have marked it—I have had this before me. Very well; I think we understand that. Now Ontario. MR. WEGENAST: In Ontario it is provided that no limitations or conditions shall be included in any such license which would limit the rights of any corporation coming within clause 7 or clause 8.

VISCOUNT HALDANE: Clause 8 is a Dominion company? MR. WEGENAST: Yes; 7 is also a Dominion company incorporated by the old Parliament of Canada.

VISCOUNT HALDANE: Very well, Ontario seeks to save Ontario. Mr. Nesbitt argues, or will argue, that that saves Ontario. We shall hear him on that. MR. WEGENAST: Then in Saskatchewan the whole Act at once becomes applicable because the company is made, to all intents and purposes, a local company. Section 25 of the Saskatchewan Act——

VISCOUNT HALDANE: I have section 23 in my copy. MR. WEGENAST: Section 25 provides in sub-section 3——

VISCOUNT HALDANE: I have something marked section 23; is that right, or should it be section 25? MR. WEGENAST: I want to refer to section 25, if your Lordship will permit. Section 23 does bring the company under the Act.

VISCOUNT HALDANE: Yes, it does. MR. WEGENAST: But section 25, subsection 3, provides that after the company has been licensed then it may carry on business to the same extent as if it had been incorporated under this Act. It is open to the same charge that the attempt is to take away he company's Dominion powers and hand it back a set of local powers.

VISCOUNT HALDANE: Yes. MR. WEGENAST: Theoretically, of course, that objection is absolutely valid, but practically, as I have said to your Lordships, there is a disposition to ignore it.

VISCOUNT HALDANE: Yes, I have marked that, I see the point. That concludes that. MR. WEGENAST: To that list of points, my Lords, I should like to add a reference to the fees. In the British Columbia Act the fees were the same as for the incorporation of a local company. I desire to point out that in every case here in these Acts the fee is the same as for the incorporation of a local company. I object to that; that is not a point in favour of the Act, in my submission, but against it, with this exception, that in Ontario it is based only on the amount of capital employed in the province, which I submit does help as regards the Ontario Act. In Ontario the fees are based on the amount of capital employed in the province, and not on the whole authorized capital. I make this point also, that if a company wishes to take out a license in Mortmain, as it is called in Ontario, it pays exactly the same fee as if it were being licensed or re-incorporated. The company is told in effect, if your Lordships will permit me to put it once more in this way, that it made a mistake in taking out a Dominion charter.

VISCOUNT HALDANE: Why should not each province say that all companies carrying on business in this province are to pay the same fee for the civil right to do business? MR. WEGENAST: If the province were to impose a tax on the civil right to do business, that is, the right as such, not mingling the matter with corporation law, then I would admit at once yes; but when the province says in one breath: We charge a certain fee for the incorporation of our companies, fees for services or a royalty for the incorporation of the company, and then turn round and charge a Dominion company that for the civil right it is a different thing.

VISCOUNT HALDANE: All companies are charged the same for the civil right. MR. WEGENAST: No, because the provincial company is let off Scot free because, forsooth, if I may put it so, it has paid an incorporation fee.

VISCOUNT HALDANE: It has paid a fee for incorporation, which carries the right, but is not that covered by the fee? MR. WEGENAST: That is our objection to it; we say it is a palpable scheme to place the provincial incorporated company in that favoured position.

VISCOUNT HALDANE: It pays the same. MR. WEGENAST: Yes, but the Dominion company pays twice, because it pays its own incorporation fee, which is practically on the same basis. My friend, Mr. Asquitth, suggests this illustration: take the case of a man going up a hill with eight stones of load on his back.

VISCOUNT HALDANE: There may be double taxation, but the province levies the same tax from everybody. MR. WEGENAST: No, my Lord, that is just what I want to come to.

VISCOUNT HALDANE: The province, I say. MR. WEGENAST: Yes, the province, but it levies the tax, if it can be called a tax, in the case of a provincial company. There are several ways of putting this, this is one way: it levies the tax in the case of a provincial company as an incorporation fee; I would submit it is not a tax at all, it is a royalty, a fee for services of incorporation.

LORD PARMOOR: If they charge nobody at all, I suppose, but what they charge for their functions and powers, then you would get exact equality. MR. WEGENAST: I presume so, but what I submit is that that scheme at once identifies this fee as company law. Then, my Lords, you observe it is payable only once for all, and does not bear the earmark of a tax. It is regarded, and anyone must regard it, in Canada a group of incorporators would regard it, as an incorporation fee, and they do so regard it, and the only result of taking out a Dominion charter——

VISCOUNT HALDANE: They may say what they like, but the fact remains that the Government takes a fee of some kind for the right to carry on business. In the case of a provincial company they say: you shall pay that as the price of being incorporated; as to the others they say: you shall pay the same; you are incorporated but you will pay the same. MR. WEGENAST: I put my proposition in this way this morning and I think I cannot put it any more clearly than this, that by this scheme the province places the Dominion company in the same position as an unincorporated group of persons contemplating incorporation under the Provincial Act. They are not put on a

parity. The provincial laws in effect deny to the Dominion company the status of an incorporated company as regards the fee.

LORD SUMNER: Put it this way: either the province incorporates you gratis, which nobody will believe, or it charges you less for a mortmain license to a provincial company than it does to a Dominion company. MR. WEGENAST: Precisely, my Lord; that puts the point exactly: either the province incorporates its companies for nothing, which is unbelievable, or it charges the Dominion company more. That is my submission, exactly.

LORD PARMOOR: It does not charge any more, does it, but the conditions are such that it eventuates in its having to pay more. The charge is just the same in one case as in the other. MR. WEGENAST: In my submission it has been urged that these are revenue Acts. I know just how difficult it is to put this acceptably to your Lordships. It is so easy for one to put a thing in a form which invites attack, but really the substance of this issue in these cases is whether the provinces can succeed by this device in taking to themselves—I quite see the objection to my putting it in this way, but in practical outcome that is so—that by this process the provinces will take to themselves the incorporation of companies throughout the Dominion; because solicitors must advise their clients that if they take out a Dominion charter it means simply paying the same fee over again for the province. It means saying in effect to the Dominion company, or to its incorporators, you made a mistake in going to the Dominion for your charter; you could have got the same thing from us for half the fee, because the fees are about the same for incorporation in the Dominion as in the provinces.

VISCOUNT HALDANE: I do not see why they should not say that. MR. WEGENAST: If that is so, then I am concluded on that point. Perhaps that was going a little too far. I submit, however, that your Lordships may well take that aspect into consideration in assigning the real pith and substance, the real intent, of this legislation. It may be that the province could do that in some way but not by way of company law, my Lords.

VISCOUNT HALDANE: I see your point. MR. WEGENAST: That is my point with respect to that my Lord. Now just on that it is important to note just how the matter is worked out in the Saskatchewan Act. That has not been brought to your Lordships' notice I think. In the first place your Lordships will observe that under section 5 of the Saskatchewan Act any three or more persons associated for any lawful purpose may by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act with respect to incorporation from an incorporated company.

VISCOUNT HALDANE: Where is that? MR. WEGENAST: Section 5 of the Saskatchewan Act. The incorporators sign a memorandum as under the English Act. Next they file that memorandum (your Lordship will find the provision in section 19) and thereupon they are incorporated. Then they go on under section 23 and become registered and finally under section 25 they become licensed.

LORD PARMOOR: You register an incorporated company then in either case? MR. WEGENAST: Yes, but the local company apparently at the point where it is left in section 19 has no real power, although it must be noted that if that is the plan of the Act it is not carried out consistently. Instead of providing as in the Imperial Act for the incorporation of a company by the registration of the memorandum, although the general plan of the English Act is carried out, the province by this device of distinguishing between filing and registration secures a position where it can say: we incorporate our companies for nothing, without the payment of any fee, because there is no fee apparently there, and then we go on and ask our own companies as well as the Dominion companies to pay a registration fee; but the scheme is quite palpable I submit, my Lord. There is no object in the world in dividing the matter in that way except to secure that logical (if it is logical) justification for this discrimination; but I ask your Lordships to observe just that: that there is no object except that. Then the whole scheme is afterwards disclosed by providing in section 25 that after the local company and the Dominion company have become licensed then they have exactly the same powers which the local company has under section 19, so that we go in a vicious circle. I am not sure that I have made the exact process clear, but what I do submit is that it is all a

part of an intention to secure this advantage for the local company, and it may or may not be that the province is entitled to do that.

There are a number of points of detail to which I should call your attention in opening; they do not go to the essence, but it will only take me a few moments I think. The first is that question of whether the effect of the Saskatchewan Act is to render contracts made under it invalid, or to preclude companies from suing. On that point I should like to refer your Lordship to one or two authorities where the cases are collected.

VISCOUNT HALDANE: What point is this on? MR. WEGENAST: The question whether under the Saskatchewan Act, as under the other Acts, a company is precluded from suing on contracts made while it is unlicensed.

VISCOUNT HALDANE: Does not the Statute say so? MR. WEGENAST: No, not in Saskatchewan, and it is urged on behalf of the Saskatchewan Act that the Act is valid because it contains no express prohibition against suing in the Courts. On that point I desire to refer your Lordships to a summary of the cases in the 7th Volume of Lord Halsbury's Digest, at page 402.

VISCOUNT HALDANE: For what proposition? MR. WEGENAST: That where you find a Statute penalizing an act or a series of acts the effect is to make them illegal.

VISCOUNT HALDANE: It is a pure question of construction in every case. MR. WEGENAST: Yes, my Lord, and it is so stated

VISCOUNT HALDANE: If an Act has made a thing illegal and imposed a penalty then, of course, it is. MR. WEGENAST: The cases are collected there and they are also very well collected in the 12th edition of Smith's Leading Cases, at page 432. There is a still later and, if I may say so, better collection in a new American Digest, which is a collection of English cases and is called *corpus juris.*

VISCOUNT HALDANE: If you throw cases at our heads they make very little impression; the whole question is what is the principle in the cases. MR. WEGENAST: It comes to this—there was so much said in the lower courts about this, that I do not want to leave any stone unturned in order to get the authorities before your Lordships. We assumed rightly or wrongly that the effect of the Act was prohibitive, and if it is, of course, it goes along with the Ontario and Manitoba Acts, if not, there may be something more to be said.

VISCOUNT HALDANE: You mean this, it is said if the company sues without having registered, then penalty shall be incurred; is that it? MR. WEGENAST: No, my Lords; by reason of the penalty being attached it must be assumed that the operations are illegal and any contracts made in pursuance of the exercise of these illegal powers will be illegal and could not be enforced.

VISCOUNT HALDANE: What is the penalty attached to carrying on business—by itself or an agent is not it? MR. WEGENAST: Yes; 50 dollars a day penalty.

VISCOUNT HALDANE: Does not that assume that it may be *intra vires* to carry on business, but it is forbidden under a penalty? MR. WEGENAST: We thought that the effect of the Act (and it calls it an offence your Lordship remembers, to carry any business on without a license) was to make it illegal to corry on business.

VISCOUNT HALDANE: Do you mean to make it *ultra vires?* MR. WEGENAST: No, to make it illegal; the province could not make it *ultra vires.*

VISCOUNT HALDANE: Of course it could not; a thing may be illegal and yet be done in a way that the law contemplates it being done. MR. WEGENAST: Yes, but if it is illegal it follows, or it may follow, at all events, that contracts are illegal.

VISCOUNT HALDANE: You may very well say if the Dominion has given power to the company and the company can properly exercise that power it is *ultra vires* for the province to impose a penalty on its doing so. MR. WEGENAST: That is not the precise point I am on. There are in the Acts of Manitoba and Ontario express provisions against the company suing and being sued so long as it is not licensed. The question is, is there a corresponding principle impliedly embodied in the Saskatchewan Act? Can a company which has carried on business sue on contracts made in connection with such business? We thought not under the authorities.

VISCOUNT HALDANE: Where is it in the Saskatchewan Act? MR. WEGENAST: There is no such express provision in it, my Lord; it is simply the penalty in section 23.

VISCOUNT HALDANE: We will look at section 23. MR. WEGENAST: In this comparative analysis your Lordship will find it; on the second page is the penalty, and in section 25 it is more severe in its language; it says: "shall be respectively guilty of an offence and liable on summary conviction to a penalty not exceeding 25 dollars."

VISCOUNT HALDANE: That is "every company"; that is not "every Dominion company"; it is "every company." MR. WEGENAST: Yes, my Lord; but suppose a company does carry on business in defiance of those provisions, is the business illegal? That is my present point. Then your Lordships will observe the provisions in the other provinces, disability to sue, on the third page, and as regards Saskatchewan there is a blank. We assume that there was an implied disability to sue by reason of the fact that the business was made illegal.

VISCOUNT HALDANE: You mean made illegal by section 23? MR. WEGENAST: Yes, my Lord, by the penalties, that is the question. Your Lordships will have in mind the analogy——

VISCOUNT HALDANE: Does it matter, if there is a right under Dominion law, a good right, to carry on business; is not it as bad to impose a penalty on it as to declare it *ultra vires?* MR. WEGENAST: It was argued in Saskatchewan that it was not so bad to impose simply a penalty.

VISCOUNT HALDANE: I do not know. Suppose you differentiated it under the Dominion powers and attached a penalty to their exercise of it?

VISCOUNT CAVE: A daily penalty. MR. WEGENAST: They will say: We do the same to our own companies.

VISCOUNT HALDANE: That may be their answer. MR. WEGENAST: But my point is a little different from that, my Lords. Leaving the question of penalties, is there a disabilitly to sue, an implied disability, in the Saskatchewan Act; and we thought there was by reason of these authorities.

LORD PARMOOR: Does the Statute imply a prohibition on a contract of this kind? MR. WEGENAST: Yes, my Lord, that is the question.

VISCOUNT HALDANE: That is a question in all these cases. MR. WEGENAST: If it does, the Saskatchewan Acts falls into the same class as the other two in that respect. May I call your Lordships' attention to the analogy of the Acts against money-lending without a license; we have, I think, the same condition there.

LORD PARMOOR: It has been held that, if this is the real construction of the Act, the penalty makes no difference; the penalty may be implied in construing the Act, that is all. MR. WEGENAST: It may be implied from a penalty that the act is to be illegal?

LORD PARMOOR: Yes. MR. WEGENAST: Yes, my Lord. There is the recent case, in which Lord Parmoor gave the judgment, of *Cornelius* v. *Phillips;* that was a case in the House of Lords, I think.

LORD PARMOOR: I do not know anything about that. MR. WEGENAST: I refer to Lord Parmoor's judgment at page 219, where the matter is dealt with.

LORD PARMOOR: I have forgotten that case altogether, but I think the general principle is pretty clear. MR. WEGENAST: It is laid down in the case of *Taylor* v. *The Cowland Gas Company*—I think that is really the best expression—" that the Court negatived the idea that there was a difference between the stringency of a Statute for the protection of the subject and one for the protection of the revenue." It was urged in Saskatchewan that it was merely for the protection of the revenue and, therefore, that it should not be deemed to have the effect of avoiding contracts: " Nice questions sometimes, however, arise as to whether the power of carrying on a particular trade according to certain rules for the protection of the revenue is merely to protect and increase the revenue by enforcing penalties against a trader who does not comply with them, or is to render the contracts entered into by such trader illegal." Now we thought—that is the only way in which I desire to make my submission—that the intent here was to prevent the company from carrying on business.

LORD PARMOOR: You say in this respect Saskatchewan is on the same basis as the other cases? MR. WEGENAST: Yes, and that in Saskatchewan the penalties were not intended merely to protect the revenue. That is my submission there.

I should like, of course, to refer your Lordships particularly to the course of my argument, which is quite brief, at the end of my case, where I approach this analysis from a different standpoint, if I may be permitted to recommend my own method of approach.

VISCOUNT CAVE: We have had that; it is at page 20, is not it?

LORD PARMOOR: That was read. MR. WEGENAST: Yes, that is merely the analysis, but going on from that are my reasons why each of those items is objected to, and if I may be allowed I should like to refer to them.

VISCOUNT HALDANE: It is in your case? MR. WEGENAST: Yes, my Lord, page 20. I do not want to read them or dwell on them at all, but I do not set out each of those items and give reasons under each item separately. There are five charges, if I may say so, against this type of legislation, and I give the reasons under each of five heads why it should be deemed invalid. There is only this one feature, which is quite important, and on which I have not dwelt at all, that I want to mention in closing; that is the difference between the Ontario Act and the other Acts in respect of the basis of taxation. If, apart from any other objection to these Acts the provinces could tax these companies on the basis of the amount of the authorized capital, without regard to the amount employed in the province or the amount paid up, then I submit it would be carrying the case of *The Bank of Toronto* v. *Lambe* a great deal further. I did intend to call your Lordships' attention to the Act, and if your Lordships would permit I should like to do so yet, which was in question in the *Bank of Toronto* v. *Lambe*. It is the second to the last document in this collection.

VISCOUNT HALDANE: Which Act is that? MR. WEGENAST: The Province of Quebec. The Act which was in question in the *Bank of Toronto* v. *Lambe* is contained in this collection; it is the second to the last document; the last one is the Public Service Bulletin of the Province of Ontario; then before that, in the collection, is the Act of the Province of Quebec.

VISCOUNT CAVE: The Quebec Corporation Tax Act? MR. WEGENAST: May I show your Lordships how the page looks, because there are several amendments at the end of it. It is entitled "An Act of the Province of Quebec imposing tax upon Corporations, Associations, Firms and Persons"; and I do invite your Lordships to compare that Act with these Acts.

VISCOUNT HALDANE: What is the section? MR. WEGENAST: The section in question is at the close of section 1347. Section 1347 is a very long section imposing taxes on a variety of kinds of companies, and your Lordships will notice that at the beginning of section 1347 the taxes are payable by commercial corporations, companies, partnerships, associations, firms, persons and agents mentioned in Article 1345. Then they impose a tax of one-tenth of one per cent. on the amount of the paid-up capital of the company, and an additional tax of 30 dollars for each place of business in Montreal and Quebec and 15 dollars for each place of business in every other place. Then there is a tax on railway companies running hotels. Then this is the section to which I should like to direct your Lordships' attention in connection with the question of capital. "The Local Governor-in-Council may allow incorporated companies coming under these terms such reduction of taxes for a fixed or undetermined period as he may deem fit just in proportion to the nature and importance of their operations in the province." This is in Quebec and my submission is that it must be assumed that, in the case of the *Bank of Toronto* v. *Lambe* the Court had in view this tax as a whole. The *Bank of Toronto* v. *Lambe* does not go so far as to hold that it is open to the province to impose a tax on the authorized capital of the company. I would submit on that that it was a discriminatory burden against a Dominion company to tax without reference to the property in the province.

VISCOUNT HALDANE: Which volume is the *Bank of Toronto* v. *Lambe* in? MR. WEGENAST: 12 Appeal Cases. Then your Lordships will find also in that collection three other Acts: one of Manitoba, one of Saskatchewan and one of Alberta, of the type which we say are perfectly competent to the province.

VISCOUNT HALDANE: You mean the same type as 1347 of Quebec? MR. WEGENAST: Yes, my Lord, taxation Acts; and we do say that it is significant to compare these with the type of Act that we object to in these cases.

VISCOUNT HALDANE: You say Saskatchewan, Alberta and what? MR. WEGENAST: And Manitoba, my Lord.

VISCOUNT HALDANE: Those are all right? MR. WEGENAST: Yes, my Lord. Your Lordship may remember that Mr. Justice Perdue refers to that and compares them. He says, in effect, if the object of the province was revenue, why did not it simply add trading companies to the list?

VISCOUNT HALDANE: Then Ontario is not like that, is it? MR. WEGENAST: You have also Acts of a similar nature in Ontario, but I have not put them in.

VISCOUNT HALDANE: What is your point about this,—only to show that the *Bank of Ontario* v. *Lambe* was limited? MR. WEGENAST: Yes, and also to invite a comparison of these Acts and to illustrate my argument that taxation is perfectly competent to provinces, but this is not taxation. There is one section in the Alberta Act to which I would object.

VISCOUNT HALDANE: Which is that? MR. WEGENAST: It is the section which says in terms that the fact that a company has not paid its tax may be set up in defence. It is section 21 of the Alberta Act.

VISCOUNT CAVE: That is not an Act with which we are concerned? MR. WEGENAST: No, I appreciate that; but having said the Act was, in my submission, within the competence of the province, I did not want to leave that without qualification.

MR. WALLACE NESBITT: My Lords, the discussion here has taken a very wide range, but I think I can confine myself in the argument to the submission of the following propositions: first: that the Dominion power under section 91, sub-section 2, is to give its creatures the right to trade in every province, but subject to valid provincial legislation. The right to trade is not limited. Secondly: The Dominion has no power, and has not purported to give its creatures the right to trade in violation of valid provincial legislation. Then my third proposition is that if licensing for the purposes of registration or taxation, etc., is *intra vires* the Provincial Legislatures, the Dominion could not empower its creatures to trade unlicensed, and the provincial prohibition is not a violation of the Dominion power. My submission is that this legislation can be described in either of two ways, legislation for the purpose of revenue or for information. It is not licensing really in the sense that the word is often used, that is to impose a discretionary power depending on whether it is going to be used or not. The word has, perhaps, throughout been used in a sense improperly, but it is merely in the nature of a receipt, that is my submission, a receipt indicating that they have complied with a regulation requiring registration for entirely proper purposes within provincial power, and a receipt showing that they have paid the taxes, or contributed to the revenue of the province so required.

Now before going any further would your Lordships permit me to draw attention shortly to what I conceive to have been the state of the authorities prior to this legislation. The first case I would ask your Lordhips' attention to as showing that the Dominion legislation was not interfering with provincial legislation, is the case that has been referred to more than once of the *Citizens Insurance Company of Canada* v. *Parsons,* in 7 Appeal Cases, and the pages I should ask your Lordships' particular attention to are pages 104, 116 and 117. Now will your Lordships consider for a moment what was involved in that case so far as applicable to what we have before us. The argument was that the Dominion having created an insurance company with power to effect insurance contracts, with power to trade, with power to do business throughout the Dominion, the provincial legislation which said that no contract could be made within the Province of Ontario except in the following conditions, was *ultra vires* of the province. I think your Lordship was in that case.

VISCOUNT HALDANE: No, it was before my time; it was a decision of Sir Montague Smith, and I do not think I ever appeared before him. Was not that the insurance policies case? MR. WALLACE NESBITT: Yes.

VISCOUNT HALDANE: The question was whether the province could put certain conditions into insurance policies. MR. WALLACE NESBITT: Whether they could state upon what conditions it could trade entirely.

VISCOUNT HALDANE: It was held that they could. MR. WALLACE NESBITT: It was held that they could, not only could the Dominion company not trade as it was authorized by the Dominion or make such contracts as it saw fit. Consider how much of what has been said by your Lordships could have been said with infinitely greater force in that case. You are stopping them making the contracts they are authorized to make. You say the province could dictate the precise terms upon which it could enter into contracts. At page 104 this is put: "By another Act of the late province"—stating the authority for granting the charter—"27 and 28 Victoria, chapter 98, further powers, including the power of effecting contracts of insurance against fire, were conferred on the company, and its name changed to 'The Citizens Insurance and Investment Company,' and, finally, by an Act of the Dominion Parliament, its name was again changed to the present title, and it was enacted that, by its new name, it should enjoy all the franchises, privileges, and rights, and be subject to all the liabilities of the company under its former name." It should enjoy all the franchises, privileges and rights and have full power to give contracts against fire. Then at page 116, about the middle of the page, "Taschereau, J., in the course of his vigorous judgment, seeks to place the plaintiff in the action against the Citizens Company in a dilemma. He thinks that the assertion of the right of insurance companies amounts to a denial of the right of the Dominion Parliament to do so, and that this is, in effect, to deny the right of that Parliament to incorporate the Citizens Company, so that the plaintiff was suing a non-existent defendant. Their Lordships cannot think that this dilemma is established. The learned judge assumes that the power of the Dominion Parliament to incorporate companies to carry on business in the Dominion is derived from one of the enumerated classes of subjects, viz., 'the regulation of trade and commerce,' and then urges that if the authority to incorporate companies by this clause, the exclusive power of regulating them must also be given by it, so that the denial of one power involves the denial of the other. But, in the first place, it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned to the Legislatures of the provinces, and the only subject on this head assigned to the Provincial Legislature being 'the incorporation of companies with provincial objects,' it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada. But it by no means follows (unless indeed the view of the learned Judge is right as to the scope of the words 'the regulation of trade and commerce') that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion that it alone has the right to regulate its contracts in each of the provinces. Suppose the Dominion Parliament were to incorporate a company, with powers, among other things, to purchase and hold lands throughout Canada in mortmain it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over 'property and civil rights in the province') that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body." Now that later was affirmed instead of being cut down by the Colonial Building case, as I read the case, and as it was read to your Lordship this morning, it was affirmed to the fullest extent, and they actually adhered to the view and point out the full application of it.

Now what I derive from that particular case is that you have, therefore, Dominion legislation creating a corporate body with full status and capacity, but that where those capacities or those powers, which is a better word, as one of your Lordships said this morning, have to be exercised, you have to look to see what the

provincial law is upon the subject, and they are exercised subject to that provincial law.

The next case as a matter of history is the *Colonial Building and Investment Association* v. *The Attorney-General of Quebec* which is reported in 9 Appeal Cases, at page 157, and as that case was read fully to your Lordships this morning I do not propose to take up further time with it. Page 166 was read, and if so it is idle to read it to your Lordships or weary your Lordships with the further reading of it. It certainly, I do submit, establishes not that the doctrine that I have read from the Citizens' case was cut down, but it was affirmed, it was restated and the doctrine given full effect to, that if a company was incorporated for an express purpose by the Dominion to trade in a particular way the province could prohibit its trading, it could absolutely render its incorporation so to speak a nullity, in other words it could not carry on the trade at all.

Now, my Lords, the next case in point of order is the *Bank of Toronto* v. *Lambe,* which is reported in the 12 Appeal Cases, at page 575, and I ask your Lordship's attention particularly so far as it is important to this case to pages 585 and 586. After stating that whether a method of assessing a tax is sound or unsound, wise or unwise, is a matter for the Legislature to judge, the judgment proceeds: "Then is there anything in section 91 which operates to restrict the meaning above described to section 92? Class 3 certainly is in literal conflict with it. It is impossible to give conclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the Provincial Legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of Parsons. Their Lordships there said: "So the raising of money by any mode or system of taxation is enumerated among the classes of subjects in section 91; but, though the description is sufficiently large and general to include direct taxation within the province, in order to the raising of a revenue for provincial purposes, assigned to the Provincial Legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one." Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the Provincial Legislatures. It has been earnestly contended that the taxation of banks would unduly cut down the powers of the Parliament in relation to matters falling within class 2, viz.: the regulation of trade and commerce; and within class 15, viz.: banking, and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words "regulation of trade and commerce" are indeed very wide, and in Severn's cases—I will come to that in a moment—"It was the view of the Supreme Court that they operated to invalidate the license duty which was there in question. But since that case was decided the question has been more completely sifted before the Committee in Parsons' case and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the Provincial Legislatures. It was there thrown out that the power of regulation given to the Parliament meant some general or inter-provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in Parsons' case, they would be straining them to their widest conceivable extent." In other words, as I understand this decision, although you have under section 91, sub-section 2, regulation of trade and commerce assisting in the subject matter of the incorporation of companies in their status and powers in this sense, that regulation of trade and commerce may be construed as meaning the Dominion under this general power to regulate trade and commerce can lay down rules of how and when and where the company shall trade throughout the Dominion, that that does not interfere in any sense with the

power of the Provincial Parliament to make certain regulations in reference to that trading. I point out in the Parsons' case and in the mortmain case two instances in which in the one case they completely regulated the nature of the contract they might enter into and in the other case it was held that they could pass a general law of mortmain which might have the effect or would have the effect of excluding a Dominion incorporated company from exercising the power which had been given to it by the Dominion to hold land generally throughout the Dominion.

Now, my Lord, the next in order of cases would be the *Brewers and Maltsters Association of Ontario* v. *The Attorney-General for Ontario* reported in 1897, Appeal Cases, at page 231, but before I come to that may I ask your Lordships to let me refer to what was referred to as the Severn case to show the history of just what was decided and how far the Court went.

VISCOUNT HALDANE: The Severn case has been to a certain extent shaken in *Russell* v. *The Queen*. MR. WALLACE NESBITT: It was overruled.

VISCOUNT HALDANE: Who overruled it? MR. WALLACE NESBITT: The Brewers and Maltsters' case. It was not overruled in fact.

VISCOUNT HALDANE: Was it the Scott Act, the Temperance Act? MR. WALLACE NESBITT: No, the same legislation as was up in the Brewers and Maltsters' case. I was just about to give your Lordships the history of this.

VISCOUNT HALDANE: Was it the McCarthy Act? MR. WALLACE NESBITT: No, that is a different thing. I will come to that in a moment. What happened in the case of the Ontario legislation was this. The section was this: "No person shall sell by wholesale or retail any spirituous, fermented or other manufactured liquors within the Province of Ontario, without having first obtained a license under this Act, authorizing him so to do." The brewers and distillers bronght it up in *Severn* v. *The Queen*, and it was held in that case that because of the provisions of section 91 in two aspects the Ontario legislation was bad; that they could not prohibit either a company or a person licensed by the Dominion expressly or licensed by them to carry on their trade throughout the Dominion in the liquor business; they could not under the guise of requiring a license before they attempted to carry on their trade, prohibit them; and it was put upon this ground by Chief Justice Strong, first the regulation of trade and commerce, and secondly the raising money by any mode or system of taxation, both enumerated heads, and he said taking either or both that this Ontario legislation was a clear infringement of the right of either company or person to carry on a trade expressly licensed by the Dominion and authorized by them to be carried on. It was sought to defend the legislation in the Supreme Court on the ground of municipal institutions, and on shop, saloon, and so on. I need not trouble further than that. That case was cited in the Supreme Court, and when it was cited in the case that I have just read to your Lordships, will you observe their Lordships rather foreshadowed their view that it was badly decided; I think that is the highest I can put that. Then what followed was this. The legislation of Ontario were evidently trying to bring the matter up to the Court of Appeal of Ontario instead of the Supreme Court, and they submitted two questions: "(1) Is sub-section 2 of section 51 of the Liquor License Act (Revised Statutes of Ontario, c. 194), requiring every brewer, distiller, or other person duly licensed by the Government of Canada, as mentioned in sub-section 1, to first obtain a license under the Act to sell by wholesale the liquor manufactured by him, when sold for consumption within the province, a valid enactment? (2) Has the Legislature of Ontario power, either in order to raise a revenue for provincial purposes or for any other object within provincial jurisdiction, to require brewers, distillers, and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented, spirituous, or other liquors, to take out licenses to sell the liquors manufactured by them, and to pay a license fee therefor? (3) If so, must one and the same fee be exacted from all such brewers, distillers, and persons?" That is to say, could they discriminate. That case was argued before the then Court of Appeal for Ontario consisting of the late Chief Justice Hagarty, Sir George Burton, Mr. Justice Maclennan and Mr. Justice Osler, if I may be permitted to say so respectfully, a very strong Court. It came up to the Judicial Committee and Mr. Edward Blake, whom your Lordships will some of

you remember, was certainly a great authority on the British North America Act, as an advocate at least, argued for the appellants.

VISCOUNT HALDANE: He was a very great authority. MR. WALLACE NESBITT: I desire to draw your Lordships' attention to what he said, although I quite appreciate your Lordships' view that one should not refer to arguments because observations which are made during the course of an argument are in no sense binding, but I do desire to draw your Lorlships' attention to the course of the argument as showing what was brought to the attention of the Court in that case and what they may be said to have decided. In the first place he denied that the license fee which was required there, $100, was a direct tax within sub-section 2 of section 92 and in the next place he denied that it was within sub-section 9 because he said the license referred to there was for a shop, saloon, auctioneer, tavern and so on.

VISCOUNT HALDANE: He was arguing for the Dominion. MR. WALLACE NESBITT: Yes, my Lord, I think your Lordship was for the province; your Lordship was for the province with the Deputy-Attorney-General, Mr. Cartwright. That was in 1896, the same year that the other case came up of the distillers, not the Brewers and Maltsters; that was another case that I may have to refer to. The learned Counsel thus put it[1]; he says as I am saying: "The contentions of the appellants are shown in the reasons which are given at the foot of the 4th and in the 5th page of the appellant's case; 'because the license referred to in the first question, being issuable of right to every brewer who applies, but so issuable only on payment of the duty, is a licence not for regulation, but for revenue.' Then the second is 'because such license is a machinery for laying a duty or tax which in the case in hand is an indirect tax.'".

VISCOUNT HALDANE: Are you reading the argument? MR. WALLACE NESBITT: I am reading the statement of the ground. It is put precisely on the same ground as we propose trying to support this; it was used only as payment of the duty; it was a license not for regulation but revenue. "Then the second is, 'because such license is a machinery for laying a duty or tax which in the case in hand is an indirect tax.'" He is clearing the ground for his argument.

VISCOUNT HALDANE: Stating what the argument against him was. MR. WALLACE NESBITT: Yes. He says: "I cannot conceive that it is arguable that if this is a direct tax it is vitiated from the circumstance that the machinery of license is used in order to its imposition."

MR. WEGENAST: What are you reading from? MR. WALLACE NESBITT: I am reading from page 21 of the argument.

VISCOUNT HALDANE: This is not the official report. MR. WALLACE NESBITT: No, this is the report of the argument.

VISCOUNT HALDANE: As I have said, it is a very awkward thing to read all these observations made in the course of the argument. MR. WALLACE NESBITT: I have said I thoroughly appreciate that my Lord, and the only thing I am referring to this for is to show what was drawn to the attention of the Court and how it was put on this type of argument and that it is not new and also to show how the Court dealt with it in the official report.

VISCOUNT HALDANE: I am sure Mr. Blake never missed a point in anything that he argued. MR. WALLACE NESBITT: It was rather that Mr. Blake was putting it that the matter of the license being issued could not affect it and that I propose adopting as a part of my argument; I could not put it as well as Mr. Blake did, I could not hope to, and therefore I am reading just how he put it in that case. Then he says: "Therefore, I have to grapple with the question, is it or is it not a direct tax, for if it is, notwithstanding the form would seem to indicate that it was 9 that we are resorting to, there is in my opinion legislative power to impose direct taxation, direct either by the machinery of license or by the machinery of saying every brewer shall pay."

VISCOUNT HALDANE: Who gave the judgment, was it Lord Herschell or Lord Watson? MR. WALLACE NESBITT: Lord Herschell. Lord Morris a little later on says: "It imposes a tax. It is only a question of words." Then Lord Herschell says: "What does it matter whether it takes the form of a license or not. The amount falls on the trader." Then Lord Morris says: "I did not

[1] See "Canadian Companies," p. xxi.

use the word 'license' designedly. I said for the privilege of carrying on the business." Just as your Lordships said, the right to trade and so on. Then Lord Herschell says: "He can only carry on business on these terms of making the payment." Then Mr. Blake says: "I accept, as I am bound to accept, Lambe's case and the line of argument." Then Lord Herschell says: "I do not quite understand how you distinguish Lambe's case, because you say that where a tax is imposed which in ordinary course is a trade tax, it being one of the burdens of trade, a trader would seek to recoup himself in his trade dealings. That is a proposition I understand, but then that seems to me to be decided against by Lambe's case. The distinction is very fine between calling it a license and calling it a condition which must be complied with if the banker carried on business." Then Lord Morris says: "They pay for the privilege of carrying on business." Then Lord Watson says: "The Act says that the bankers are not to carry on business without paying that license duty." Then later on in reference to this license may I read this observation. "Lord Herschell: How do you cut down the words 'Other licenses?'" It was said this could not come within the category of shop, saloon, tavern or other licenses. "This is another license. How do you cut it down so as to exclude a brewer for example." That is the case I was putting. Then Lord Herschell says again: "In the case I was putting it is true you may have something *ejusdem generis,* but I take a brewer as *ejusdem generis* with an auctioneer, seeing that they are both carrying on a calling. Supposing that ordinarily this would be indirect taxation and not direct taxation and then the legislation has said 'We will impose a direct tax and require a man who carries on a calling to take out a license which they may impose for the purpose of raising revenue, why may not it be so.'" Then later on in the argument Lord Morris puts it: "I can understand them putting it in this way, that having paid his way with the Dominion he ought to be allowed to exercise that trade in every one of the provinces of the Confederation without doing anything more or being put to any disability. But if you say that, would not every word of that apply to the bank case?' Mr. Blake: 'Of course, if this be direct taxation, your Lordship's observations would apply.' Lord Herschell: 'So it would be if it be a license within sub-section 9.' Mr. Blake: 'Yes, but I am endeavoring to argue that the words in sub-section 9 ought to be given such a more limited construction as accords with the minor subject of the tax which are specified and as does not grant a power of indirect taxation which would not merely contract generally or affect or impair generally the power of indirect taxation of the Dominion by tending to exhaust the subject, but would also specify and in this case affect a subject which has been dealt with under a competent exercise of its powers by the Dominion fully and exhaustively.'"

VISCOUNT HALDANE: Is that where Lord Herschell says there is no uniform category running through the enumeration? MR. WALLACE NESBITT: Yes.

VISCOUNT HALDANE: And therefore you must read the words "other licenses" generally. MR. WALLACE NESBITT: In the widest possible way.

VISCOUNT HALDANE: As including all licenses. MR. WALLACE NESBITT: Yes, but what I ask your Lordship's attention to is the observation which I think is carried into effect by the judgment. He says "I can understand them putting it in this way that having paid his way with the Dominion he ought to be allowed to exercise that trade in every one of the provinces of the Confederation without doing anything more or being put to any disability. But if you say that, would not every word of that apply to the bank case?"

VISCOUNT HALDANE: I suppose you say even if this is not a tax it is a license. MR. WALLACE NESBITT: If it is not a tax it is a license and under subsection 9 is equally good.

LORD PARMOOR: If it is one or the other, would it matter that it interfered with Dominion power?

VISCOUNT HALDANE: It would not matter to Mr. Nesbitt. He would be content to say if it is a license it is not any less authorized by section 9, nothing to do with direct taxation for provincial purposes, but this case shows you could impose it upon a Dominion organization. MR. WALLACE NESBITT: Yes as a license for the privilege of carrying on business upon certain terms; that is to

say, when you come to analyze what has been passed by the Legislature here I cannot conceive how it can be urged that the legislation is more than, in the case of Ontario which I will deal with first, that we ask them to register and we ask them to give us certain information as to the amount of their capital stock and as to the authority to carry on business and to make an annual return showing who their stokholders are and the like.

VISCOUNT HALDANE: In the Brewers and Maltsters' case I appeared for the Dominion. It was said you cannot carry on business in Ontario till you had taken out a license under sub-section 9 of section 92 and then that you should acquire no power at all till you had taken out that license, and it was in the Brewers and Maltsters' case that was valid and you say that that is analogous to telling a Dominion company you shall not carry on a business in this province until you pay your tax. MR. WALLACE NESBITT: Yes, until you pay your tax.

VISCOUNT CAVE: Do you really say that this license to the company to carry on its trade falls within paragraph 9. Lord Herschell said it was confined to some extent to companies of the same kind. MR. WALLACE NESBITT: I do not see how you could. How did you cut down the words "Other licenses?"

VISCOUNT HALDANE: He says you could not. MR. WALLACE NESBITT: I do not so understand that he cut it down.

VISCOUNT HALDANE: I do not think he did. He says very clearly you are to look at the enumerating language to see if you could find a genus and if so you could cut down the general words, but if not the general words had a wider signification. Lord Herschell took that view.

VISCOUNT CAVE: I am not quite sure. He says "But they are unable to see what is the genus which would include 'shop, saloon, tavern' and 'auctioneer' licenses and which would exclude brewers' and distillers' licenses," rather holding that there is a genus, but so much so that it would include not only shops and saloons but all other things. MR. WEGENAST: In the passage which my learned friend read, Lord Herschell says in turn: "But I take a brewer as *ejusdem generis* with an auctioneer."

VISCOUNT HALDANE: That was in the course of the discussion; he did not say that in the judgment. MR. WEGENAST: I thought it was supported by what he said in the judgment.

MR. WALLACE NESBITT: No, if my learned friend desires to do that, will your Lordships see how he puts it. "In the case I am putting it is true you may have something *ejusdem generis* but I take a brewer as *ejusdem generis* with an auctioneer in the sense that they are both carrying on a calling;" that would refer to every trader carrying on a calling; that is the genus. I may be wrong about it but I have always assumed ever since the Brewers and Maltsters' decision that the words "other licenses" was practically unlimited and that it covered any kind of license. It is not at all important to my argument on this case but I see what your Lordship means, I had not taken that meaning of it. May I draw your Lordship's attention to something in the official report in 1897 appeal cases of the Brewers and Maltsters' case, page 231.

VISCOUNT HALDANE: I think it must be licenses for carrying on the same kind of business. MR. WALLACE NESBITT: I thought dog-licenses would probably come under Municipal Institutions.

VISCOUNT CAVE: It may mean you cannot apply the rule of *ejusdem generis* at all. It may mean the genus indicated by the words is large enough to include a brewer. MR. WALLACE NESBITT: Yes; I have always assumed you could not apply that "other licenses" must be given the widest possible meaning.

VISCOUNT HALDANE: I would like to know the genesis of these words. The Quebec regulations are in the 1st volume of Cartwright, I think. MR. WALLACE NESBITT: They are in Pope much better.

VISCOUNT HALDANE: I want to see how they got in. MR. WALLACE NESBITT: May I continue, my Lord?

VISCOUNT HALDANE: Yes. MR. WALLACE NESBITT: May I draw your Lordship's attention to the fact that at page 233 of the official report "That Mr.

Blake for the appellants accepted the negative answer to the third question." How far does that carry me on the question of discrimination? It had been decided by the Court of Appeal and it is put at page 233 as it was in the Court of Appeal; I need not go back to it in the Ontario reports, but in the Court of Appeal it sums it up in this way; I do not know whether it will recommend itself to your Lordship's judgment or not.

VISCOUNT HALDANE: Will you tell me this, my recollection was that these regulations were in the 1st volume of Cartwright; I am sure they are in Cartwright. MR. WALLACE NESBITT: I use Pope always.

VISCOUNT HALDANE: I do not know that we have Pope. MR. WEGENAST: I have not got it here, but I have at the hotel an analysis of the way in which this enumeration appeared in six or eight different editions by Cartwright, and I should be glad to place that at your Lordship's disposal.

VISCOUNT HALDANE: The last one is the important one. I have them in the second volume at page 685; they are in the second volume, and I suppose they were put in as an afterthought. They are enormously long as you know: "Shop, tavern, auctioneer and other licenses." The draftsman has just jettisoned what they said straight away into his draft. It does not throw any light on it. MR. WALLACE NESBITT: It does not carry it any further. I merely point out that on page 233 of the official report in 1897 Appeal Cases it says Mr. Blake conceded the answer to the third question to be correct. The answer to the third question by the Court of Appeal was this, that they could discriminate in this tax between parties, and Mr. Justice Osler puts it in this way, and it apparently recommended itself to Mr. Blake's judgment, and I hope it will to your Lordship's judgment if it becomes important. He said: Granted the Provincial Legislature has power to legislate upon a given field, what is there to hinder them legislating in any way they see fit in reference to the occupants of that field; in other words, if they have the power to levy a direct tax they would be perfectly right to say that occupying companies should pay a certain type of tax; silver mining companies should pay another type of tax, and another company should pay another type of tax; or, to put it in other words, the tax need not be as in the United States, where a tax must be universal and applicable to all; that is by reason of certain differences in the constitution; but he said once you get the right, the ambit of legislation within the province, the legislation itself within the province is the arbiter as to how they should exercise that right. Mr. Blake conceded that, and I draw your Lordship's attention to that. Then in this case Lord Herschell took the view that the enactment was within section 92, was direct taxation within the province, and that the province had a right by virtue of its power to tax, a right to enforce the sanction for the tax, namely that before you could come in you should pay your way. Now what does the whole of this litigation mean? It is not like British Columbia in the slightest degree. So far as Ontario and Manitoba are concerned we do not pretend to interfere with the Dominion company's status or capacity or its power, what we say to it is you come to the borders of the province, you come clothed with full powers, but we have a right to obtain something from you by way of revenue.

VISCOUNT HALDANE: In common with everybody else. MR. WALLACE NESBITT: In common with everybody else. I am not at all sure that that even would be necessary, in common with everybody else, in view of what I said before, but that is not important because that is what we do say; we ask you to contribute 150 dollars. The moment you pay that toll you can exercise your powers under that, both status and capacity, you can carry on your business in any way you please, all we ask you is to pay that. Now will your Lordships reverse that. Supposing we allow them to come into the province, how can the date at which we ask them for the payment make any difference if we stop them doing business unless and until they make the payment? Supposing we let them into the province and they become residents, it is on residents we tax them, when they seek to become residents we tax them, and that is why once or twice I ventured to intervene and say I did intend to make something of that point. It is our view that upon taking residence we ask for payment. Supposing we let them take up residence and they start to take up business and we impose a tax of 150 dollars

and say you must pay it, have we not a right in order to compel the payment of that to say the sanction of it shall be that you stop doing business if you do not pay? Have we got to sue them and follow them if they have not got property to Nova Scotia, or wherever their head office may be, or up to British Columbia, and endeavor to collect through the sheriff. Can we not say after they become resident if you do not agree with and pay the tax which has been imposed we will stop you doing business until you do?

LORD PARMOOR: Suppose there is power to impose a tax or suppose the Legislature could compel its payment in any way it likes under any form of penalty it thinks fit. MR. WALLACE NESBITT: It is under the Penalty Clause, section 15.

VISCOUNT HALDANE: Could they say you shall forfeit all your powers? MR. WALLACE NESBITT: No, we do not say that; I do not think they could; there must be some attempt to interfere with their status, but I think we can say you shall not exercise the privilege of carrying on your trade till you pay. That is a different matter; that is a very different story. Now can it matter when we say it to them; they come to us and say we are going to become a resident, and accordingly we say to them you must pay your way, you must pay your toll, and then you can exercise all the powers you see fit to carry on your business in any way you see fit. Can it matter whether we say that at that date, or in the immediate afterwards after they have become resident, and we ask them then to contribute? That is all this case is about.

VISCOUNT CAVE: You say you can impose a tax as you do on any other companies? MR. WALLACE NESBITT: These are trading corporations. We tax the railway companies, we tax the insurance companies; there are special regulations relating to them, and trust companies are taxed. This is put to cover a license for all trading corporations, and it is put for this reason, that it is a Combination Act if your Lordships will let me answer when we come to that. The license is only the santion, only the enforcing, that is the point I am making, and in that license we in no sense interfere with their status or powers. The real point of the section is it is not a Company Act, it is control. If my friend is right then any Act is Company Act that points out the regulations of the company. Let me show that to your Lordships. This is the Companies Act, a very thick volume.

MR. WEGENAST: It quotes this Act.

MR. WALLACE NESBITT: And this is the Provincial Companies Act. Chief Justice Meredith grouped together the different sections. The real object of the Act is to give registration. Registration for what, for the purpose of section 135 of the general law relating to companies, provincial and otherwise. What is section 135? I will not trouble your Lordships more than drawing your attention to what they have to return each year: "(a) The corporate name of the corporation. (b) The manner in which the corporation is incorporated, whether by Special Act or by letters patent, and the date thereof. (c) The names, residences, and post office addresses of the President, Secretary and Treasurer of the corporation. (d) The name, residence, and post office address of each of the Directors of the corporation."

VISCOUNT HALDANE: Are there similar provisions for provincial companies? MR. WALLACE NESBITT: They are all put in the same category by this Act.

VISCOUNT HALDANE: This is the Companies Act. MR. WALLACE NESBITT: Yes, this is the companies law: "The date upon which the last annual meeting of the corporation was held." And in the case of a corporation having share capital, in addition "(f) The place of the head office, giving street and number where possible; (g) the amount of the capital of the corporation and the number of shares into which it is divided; (h) the number of shares subscribed for and allotted; (i) the number of shares, if any, issued as fully paid-up shares as consideration for any transfer of assets, good-will or otherwise"—that is most important information: "If none are so issued this fact to be stated; (j) the amount of calls made on each share; (k) the total amount of calls received: (l) the total amount of shares forfeited; (m) the total amount of shares issued as preference shares and the rate of dividend thereon; (n) the total amount paid on such shares; (o) the total amount of debentures, debenture stock or bonds authorized, and the rate

of interest thereon; (p) the total amount of debentures, debenture stock or bonds issued; (q) the total amount realized from debentures, debenture stock and bonds; (r) the total number and amount of share warrants issued, and the names, residences and post office addresses of the persons to whom they were issued," and so on. If it is a mining company it is different. That is the information which is required following the register and license, and, as I say I shall have to refer to it when I come to analyze the section. My submission is that the license that has been so much discussed is merely something which indicated the amount that is imposed upon them. That this registration takes place which requires an annual return of this information, the character of which I have read to your Lordship, is simply statistical or informative, requirements absolutely necessary in the interests of the inhabitants of the province in reference to a new citizen coming in taking up his residence in the province, not a person but a juristic body, and well within the language of your Lordship in the John Deere Plow case as to the type of information which we can require. How that could be said to be company law simply because it is in reference to corporations beats me.

VISCOUNT HALDANE: The essence of the John Deere Plow case is the essence of the differentiation. MR. WALLACE NESBITT: I intend to point out the extraordinary differentiation that was wanted between this case and the John Deere Plow case. I will found myself, with permission, on the very clear statement by Lord Sumner when I come to it. I propose adopting what his Lordship in the argument pointed out to Sir Robert Finlay was the real rub of that case. Then the next question I ask your Lordship's attention to if I am right as to how far I have made good so far my statement upon the powers given to these corporations to trade in every province subject to valid provincial legislation is the *Canadian Pacific Railway Company* v. *Corporation of the Parish of Notre Dame du Bonsecours,* which is reported in 1899 Appeal Cases at page 370, and the page I wanted to refer to is page 372. Your Lordship will see how far that case carries us bearing in mind that the Canadian Pacific is the great inter-provincial railway that is expressly under section 91, under the Act of Railways, expressly excluded by subsection 10 from any possible, if I may so describe it, provincial legislation. Your Lordship will remember that sub-section 10 provides that in the case of a railway and other works of that kind if they are declared to be for the general advantage of Canada, or if they run from province to province they are still not within the section. So far as that avails me, I ask your Lordship's attention to it. What was decided was that a provision relevant to the clearing out of ditches and so on was within municipal powers. It is page 372.

VISCOUNT HALDANE: Was not it said if it had been on the embankment of the railway it would have been otherwise? MR. WALLACE NESBITT: Yes, interference with construction. It shows how narrow the cases are: "The British North America Act, whilst it gives the legislative control of the appellants' railway qua railway."

MR. WEGENAST: "Qua railway?" MR. WALLACE NESBITT: Yes, I am going to read it: "to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the Provincial Legislatures." Now, why I want this is that while it declares the company is a Dominion company with its status and power, it does not declare or pretend to declare, that is my second proposition founded upon this, it does not pretend to give it the right to trade in violation of any valid provincial legislation.

VISCOUNT HALDANE: Was that a judgment of Lord Watson? MR. NESBITT: Yes.

VISCOUNT HALDANE: There was something he said in the course of the judgment which laid down a principle somewhere I remember. MR. WALLACE NESBITT: In what, my Lord?

VISCOUNT HALDANE: In the judgment. MR. WALLACE NESBITT: Nothing further than I speak of I think. He says at page 371: "It is not a matter of dispute that, by virtue of these enactments the Parliament of Canada have and had the sole right of legislating with reference to the matter of the appellants' rail-

way. As it passes through the parish of Notre Dame de Bonsecours, the railway runs along a piece of ground belonging to one Julien Gervais, from which it is separated by a hedge, which is the boundary of the railway, and the property of the appellant company." But then he says, "whilst it gives the legislative control of the appellant's railway qua railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the Provincial Legislatures." That is the part I emphasize "of the Dominion Legislature."

Then the next case I ask your Lordship's attention to is *The Attorney-General of Ontario* v. *The Attorney-General for the Dominion* reported in 1896 Appeal Cases at page 348. That is the one I spake to your Lordships about a few moments ago, the distillery case as against the brewers. I do not know if your Lordship remembers it. You were in it.

VISCOUNT HALDANE: Yes. MR. WALLACE NESBITT: I desire at page 360 to call your Lordship's attention to something that is said: "But to those matters which are not specified among the enumerated subjects of legislation, the exception from sec. 92, which is enacted by the concluding words of sec. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to Provincial Legislatures by sec. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in sec. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92." Then further on your Lordship raises the question about when a matter becomes of such wide importance.

LORD PARMOOR: It comes to this, there is no interference with the status, but the status is subject to specific matters in section 92, sub-section 2. MR. WALLACE NESBITT: Yes.

LORD PARMOOR: It would be an element really of the incorporation itself.

VISCOUNT HALDANE: This is the case where *Russell* v. *The Queen* came up.

MR. WALLACE NESBITT: Then, my Lord, the next case is the *Attorney-General of Manitoba* v. *The Manitoba License Holders' Association* in 1902 at page 73, and the passage I wish to refer to is at page 79. Your Lordship was in that case as well.

VISCOUNT HALDANE: I remember the case. MR. WALLACE NESBITT: Now what your Lordship pointed out there was this. Your Lordship will remember in that case it was argued on the other side from the point your Lordship was arguing for.

VISCOUNT HALDANE: I think this would be a convenient time to break off.

(Adjourned to to-morrow morning at 10.30.)

FIFTH DAY.

MR. WALLACE NESBITT: I was drawing your Lordship's attention when the Board rose to the Manitoba License case in 1902 Appeal Cases, page 73, at page 79.

VISCOUNT HALDANE: I have some recollection of this case. It was a case in which the provincial right was pushed further than it had been pushed before. I think I was in the case, and I think Manitoba succeeded. MR. WALLACE NESBITT: Yes.

VISCOUNT HALDANE: Mr. Blake was arguing for the Dominion. MR. WALLACE NESBITT: Yes, he was on the other side. I was drawing attention to the part at page 79. I think your Lordship is quite right that it pushed the right to what we think the proper position of the province is.

VISCOUNT HALDANE: So that *Russell* v. *The Queen* had another knock. MR. WALLACE NESBITT: Yes. I am coming to *Russell* v. *The Queen* in a moment.

In the middle of page 79 their Lordships say: "The judgment, therefore, as it stands and the report to her late Majesty"——

VISCOUNT HALDANE: I think it is right that you should notice the earlier passage where Lord Macnaghten says: "On the one hand, according to *Russell* v. *Regina,* it is competent for the Dominion Legislature to pass an Act for the suppression of intemperance applicable to all parts of the Dominion, and when duly brought into operation in any particular district deriving its efficacy from the general authority vested in the Dominion Parliament to make laws for the peace, order, and good government of Canada. On the other hand, according to the decision in *Attorney-General for Ontario* v. *Attorney-General for the Dominion,* it is not incompetent for a Provincial Legislature to pass a measure for the repression, or even for the total abolition of the liquor traffic." MR. WALLACE NESBITT: Yes, that was the Distillers' case as opposed to the Brewers and Maltsters' case if your Lordships will carry them in your mind.

VISCOUNT HALDANE: There was something like a direct conflict with *Russell* v. *The Queen*; it was the same subject-matter. MR. WALLACE NESBITT: Yes, they turned *Russell* v. *The Queen* practically upside down. One has always assumed that it was rehabilitated a little in the insurance reference. This case decides this: "The judgment, therefore, as it stands, and the report to Her late Majesty consequent thereon, show that in the opinion of this tribunal matters which are 'substantially of local or of private interest' in a province—matters which are of a local or private nature 'from a provincial point of view,' to use expressions to be found in the judgment—are not excluded from the category of 'matters of a merely local or private nature,' because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion Statutes to carry on particular trades."

LORD PARMOOR: That is, regulation within the province may effect the position outside. MR. WALLACE NESBITT: Yes. Then I come to the John Deere Plow case. I hope I am not trespassing on any rule of your Lordships if I ask your attention to the summation of it which Lord Sumner made at pages 130 and 131, because I think it puts it more neatly than I can if I may adopt it as my argument.

VISCOUNT HALDANE: You may read it, but this book is a very awkward thing to introduce into our discussion. MR. WALLACE NESBITT: I think it is, but the difficulty is that in our Courts it has become a little fashionable of late to practically make use of all the observations of your Lordships, the whole argument. One is met on the other side a greater part of the time with the statement that their Lordships thought this, or thought that, or thought the other, not as evidenced by the ultimate judgment, but by casual observations made probably for the purpose of eliciting information, or for the purpose of clearing the atmosphere, or something of that sort, and treated almost as solemnly as the judgment.

VISCOUNT HALDANE: Lord Sumner is most careful in framing his observations, and, of course, he may have been quite right. Perhaps you had better read them.

LORD SUMNER: Probably not. I think you had better not read them. MR. WALLACE NESBITT: I have such a belief in the soundness of the statements that perhaps your Lordships would allow me to read them.

VISCOUNT HALDANE: It is suggested to me by Lord Cave, and I am sure it expresses the opinion of my colleagues and myself, that it is a disastrous practice. There is no settled opinion until you come to the judgment, and for the purpose of eliciting points it is very valuable in conversation to put to counsel the difficulties from time to time, but they are not settled observations, and taken in this fashion they are very misleading. MR. WALLACE NESBITT: Yes. My only excuse is that made on another celebrated occasion. I have only sinned once.

VISCOUNT HALDANE: I hope you will use your great position at the Bar in Canada to make it known that we do not attach importance to these inter-

locutory observations. MR. WALLACE NESBITT: Your Lordship's observations will be in print, and I will see that they are diffused.

VISCOUNT CAVE: Many observations are made before the tribunal have heard both sides. MR. WALLACE NESBITT: Yes. I would not read it except that it covers the precise point I am coming to. Lord Sumner says: "This is legislation which on the face of it in section 152 says the Registrar is the sole judge, he may impose terms, and he, subject to an appeal to the Lieutenant-Governor, shall be the sole judge of what is reasonable or not, and section 149 when you get to the Lieutenant-Governor, he can annul a license for any good cause of which alone he is the judge." Then there is some discussion, and then Lord Sumner says to Sir Robert Finlay: "You must stand on one foot or the other." If the ground on which the license was refused was: you will not take another name, the answer appears to be: We are incorporated under this name, it is an integral part of the incorporation to have a name; your legislation which requires us to take another name than that which we are incorporated under derogates from our status as a Dominion incorporated company. Conversely if it is said: I do not rely on the specific facts—because you did not take out a license within part VI., the answer may be: No, we did not because among other things the attempt to get the license submitted as absolutely to the discretion of the Registrar, and the taking out of the license if we had got it would have limited us and our trading to compliance with the terms that he might insert, and only on those terms could we stand in line with the provincial companies trading in competition with us. On the second ground it seems to me you have to justify the whole of part VI. so far as it relates to licenses. Then let us see what the judgment says at pages 342 and 343 of 1915 Appeal Cases just at the foot of the page: "It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by section 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the Statutes of the province as to Mortmain (*Colonial Building and Investment Association* v. *Attorney-General of Quebec*), or escape the payment of taxes even though these may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe*). Again, such a company is subject to the powers of the province relating to property and civil rights under section 92 for the regulation of contracts generally: *Citizens Insurance Co.* v. *Parsons*. To attempt to define a *priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by the operation of this principle is a task which their Lordships do not attempt. The duty which they have to discharge is to determine whether the provisions of the Provincial Companies Act already referred to can be relied on as justifying the judgments in the Court below. In the opinion of their Lordships it was not within the power of the Provincial Legislature to enact these provisions in their present form. It might have been competent to that Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information." That I will come to a little later. "It might also have been competent to enact that any company which had not an office and assets within the province should, under a Statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under section 92 to the Provincial Legislature." Then your Lordship refers to the analogy of the decision in the *Union Colliery Co.* v. *Bryden*, and I shall have a remark or two to address to that in a moment. My submission is what you decided in the John Deere Plow case was that they could not interfere with the status, or the powers of a Dominion company, the later provisions being subject to the fettering provisions I have read that in interfering with their powers they may

be valid provincial legislation to an extent regulate the method in which those powers may be exercised within the province under the general law of the province such as Mortmain, or such as in the very marked case of the insurance company, because I ask your Lordship's attention to what that decision means. Remembering that the company was expressly chartered by a special Act of the Dominion Parliament to carry on the business of insurance, what happened? The only business of insurance they could carry on was the business of insurance in which the contract must be in a certain form under the provincial law, and that was upheld. In the same way you get the *Bank of Toronto* v. *Lambe*, and the Brewers and Maltsters' case, and if you look at the form of question asked and answered by this Board it was: Can a province prohibit a person expressly licensed, a Dominion company it may be, but whether it is a person or a company matters not as Lord Haldane said—Can the Ontario Legislature where a person is expressly licensed to carry on a particular form of business prohibit him unless and until he obtains that license, and their Lordships held under the taxation provisions they could, and similarly there could be no difference between sub-section 2, that is direct taxation and administration of justice, if it falls within that it is equally within the exclusive power of the province.

Lord Parmoor: Supposing the registration is open I find a difficulty in seeing how it is a matter of status at all. If the register is open one can see it may be, but supposing it is open, what do you mean by status? I cannot see that it is a matter of status at all. Mr. Wallace Nesbitt: If your Lordship asks me what that means, I have heard it repeated many times, the pith and substance; it has become almost as bad as the determination of small nations. It is rhetorical, and there is about as much sense in it. Status, as I understand it, refers to the thing that is called the corporate entity. That would be the status. Its powers or capacities are what the juristic body, or the entity, can do—what it is authorized to do or to carry out. I illustrated it once in this Court, and perhaps I may do so again. I think the Dominion power would be represented if you look at this building as the Dominion, and each room in it as a province. The province can create a juristic body which has full authority to carry on in this room, but it has no authority except by the leave of the doorkeeper to go into another room, another province, but the Dominion supplies a juristic body on the threshold here with a master key that will enable it to go into every room in the building and carry out its full powers. If that illustration is correct, the juristic body that has been created outside by the Dominion represents its status. Its powers or capacities are represented by what it may do when it gets into the building in the various rooms. How is it possibly interfered with by the legislation here in question? The distinction I ask your Lordships to draw between this case and the John Deere Plow case is this. I ask you to say that that was all that was decided, and all that was apparently up, and the reason for deciding that the complexion of the Act was governed by section 152, and I have forgotten the other section that Lord Sumner referred to—that no matter which foot the province stood upon it was affecting corporate status, and therefore I say the broad difference between the cases now before your Lordship and the John Deere Plow case is that the point was that the license might be given or withheld entirely in the discretion of the provincial authorities, and that in fact in that case they had insisted upon an entire change in the status of the company, namely in its corporate name, and that in these cases there is no discretion, there can be no limitation as a condition, and that all that is done, following the illustrations that I have given, is that when they come to the door they say:—You may come in, but you must pay 150 dollars. How can that be said to be carrying the doctrine as far as in the insurance case, where they say: You can only carry on in this room if you carry on with the form of contract that we supply you with; and in the Maltsters' case: You can only carry on in this room with various restrictions? There was a prescription as to the number of bottles, and all sorts of regulations contained in the license. Yet those regulations were held good by your Lordships, and if there is to be any continuity of jurisprudence my submission on behalf of the provinces is that it is impossible to say that a request under section 19 and section 20 of

our Act means a request under section 24—those are the three governing sections in the Ontario legislation—for information to be supplied under the Companies Act for all companies. I read yesterday what the information was, and I will not repeat it. I will pass from that.

VISCOUNT CAVE: Following up your illustration, may not it be said on the other side that the doorkeeper, when the Dominion seeks admission, does not say: You may come in if you pay 150 dollars, but: You may come in if you buy another key from me? MR. NESBITT: It is not another key; you may pay your way.

VISCOUNT CAVE: You must get a fresh license. MR. WALLACE NESBITT: Another key involves the notion of interference with his ability to enter—not subject to a mere payment, but his ability to enter at all; it interferes with the status and powers.

VISCOUNT CAVE: Supposing they say: You shall not enter until you get a license from us? MR. WALLACE NESBITT: Until you have paid us taxes, and we have given you a receipt in the form of a license. It is machinery really.

VISCOUNT CAVE: It is a license all the time. He cannot get it unless he complies with the Statutes and the regulations. MR. WALLACE NESBITT: Yes, but the license does not fetter him. The insistence upon another key would be a complete interference with him, because he would have to have the two keys. He has only to put his hand in his pocket now and to pay the 150 dollars.

VISCOUNT CAVE: Is he not forbidden to trade until he gets the second key? I am just putting it?

VISCOUNT HALDANE: There is an observation that is not important in this connection on page 79 in the Manitoba case. I am not sure that you did not read it: "The judgment, therefore, as it stands"—that is the judgment in the Ontario case, Lord Watson's judgment—"and the report to Her late Majesty consequent thereon, show that in the opinion of this tribunal matters which are 'substantially of local or of private interest'"—that is section 92—"in a province, matters which are of a local or private nature 'from a provincial point of view,' to use expressions to be found in the judgment, are not excluded from the category of 'matters of a mere local or private nature,' because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under the Dominion Statutes to carry on particular trades." MR. WALLACE NESBITT: I read that to your Lordships this morning.

VISCOUNT HALDANE: Apparently Lord Macnaghten and Lord Watson thought there might be a request that a key should be bought; still that does not upset the thing. They look, I suppose, at the expression "pith and substance," which came in here. MR. WALLACE NESBITT: The pith and substance, as I submit, of the John Deere Plow case is, that there was an absolute discretion in the authorities to give or refuse a license; there was an absolute discretion to impose conditions.

LORD PARMOOR: I might put this to you, in order to follow what you are saying. Take the John Deere Plow case. One of the elements of status is the area within which they can carry on their operations obviously. The effect of the license and registration provisions in the John Deere Plow case was to prevent a company carrying on its operations within the provincial area, because they were told they could not come in without altering their name, and they were excluded. Supposing you have no exclusion, supposing the status of the company is to operate here, then I think there is ample authority for saying that the Provincial Legislature can impose a tax on a Dominion company. MR. WALLACE NESBITT: This has been held to be taxation.

LORD PARMOOR: We have heard the authorities with regard to the question of licensing. As to exactly how far they go I think there is some doubt; and we have had the authorities which the noble Viscount has already referred to: that if it is a matter of regulation or taxation indirectly you may, and possibly must, interfere with the Dominion company, but not with the status of it.

VISCOUNT HALDANE: I should like to ask a question about it. May it not be that the real ratio of the John Deere Plow case was that the interference of the province was not an interference for any provincial purpose which was conceived by the enumerations of section 92; may it not have been regarded as an interference really with the status at large of the Dominion company not justified by any express power on the part of the province? MR. WALLACE NESBITT: There are observations in the judgment immediately following those which I read to your Lordships, that is within the last half page of the judgment, that would appear to uphold the doctrine of *The Union, etc. Co.* v. *Bryden,* and therefore it was not legislation of the character that we suggest this is.

VISCOUNT HALDANE: You say that would answer the question about status. A Dominion Act of Parliament may give any status and powers and capacity it thinks proper, but it may be for purely provincial purposes the province can interfere, but unless it is for purely provincial purposes it cannot. MR. WALLACE NESBITT: My friend, Mr. Lawrence, suggests I should draw your Lordship's attention to my propositions which I started out with first, that the Dominion's power under section 91, sub-section 2, is to give its creatures the right to trade in every province, subject to valid provincial legislation, secondly the Dominion has no power, and has not purported to give its creatures the right to trade in violation of valid provincial legislation, and thirdly that if licensing for the purpose of registration or taxation is *intra vires* the Provincial Legislature, the Dominion cannot empower its creatures to trade unlicensed, and the provincial prohibition is not a violation of the Dominion power. Can it be argued, following your Lordship's observations, that section 14 of this Act, which gives the complexion to the whole Act, is not proper provincial legislation? May I draw your Lordships' attention to the kind of information that is required?

VISCOUNT HALDANE: Supposing the provinces said: You shall not carry on without a license from the province, that is to say you must register, although we will bind ourselves to give you a license, that is not for any definite provincial purpose? MR. WALLACE NESBITT: No, but the definite provincial purpose provided for in section 135 is that they must register in order to give this information to the province, namely the corporate name, and so on. I read all the particulars yesterday.

VISCOUNT CAVE: That only arises afterwards. MR. WALLACE NESBITT: That is why registration is called for. I say that is what gives the complexion to the whole Act, and the importance of it is this. Each of these provinces is practically an empire in itself. They differ enormously in the point of view of their inhabitants as to what is good for public purposes one province from another. Take Quebec, where they have an entirely different system of company law from Ontario. There is a different system of company law again in British Columbia from what they have in Manitoba.

LORD PARMOOR: Might not you say this: that all those matters referred to in section 135 are matters of regulation of trade within the province which would come in or fall under section 92? MR. WALLACE NESBITT: Yes.

VISCOUNT CAVE: I think they are, but that only arises after registration. MR. WALLACE NESBITT: You can bring it in by getting registration. Supposing your Lordship was administering the department——

VISCOUNT HALDANE: Supposing there was the bald provision: You must be registered? MR. WALLACE NESBITT: How can you get to be registered? You first say, you register, then you can get this information. The registration is in order to get the information.

VISCOUNT HALDANE: You might get the registration simply by putting on the company the duty to get it. Supposing Ontario had said, to test it from another side: No Dominion company is to have any power to carry on business in this province unless it registers, but we bind ourselves to allow them to register. Would that have been valid? MR. WALLACE NESBITT: I should have said that came under administration of justice, or matters of a local or private nature.

VISCOUNT HALDANE: No, that is very specific. You are driven to civil rights. MR. WALLACE NESBITT: That is what I was really trying to think of.

VISCOUNT HALDANE: "Civil rights" has been used over and over again as an expression to cover everything. If the Dominion has power to say: You may go into the province under trade and commerce, what right has the province to say: You shall not do it unless you register? MR. WALLACE NESBITT: The right that has been determined in one case after another by your Lordships. I say unless there is going to be a complete reversal of the jurisprudence of this Board you have to recognize what was decided in Parsons' case, in the Brewers and Maltsters' case, in the Mortmain case, in the Manitoba case, and in one case after another.

VISCOUNT HALDANE: In every one of these it was recognized that the power was required. MR. WALLACE NESBITT: It was property and civil rights.

VISCOUNT HALDANE: That is very much more general. MR. WALLACE NESBITT: But it was under property and civil rights in the Parsons' case, and under matters of a local and private nature in the Mortmain case.

VISCOUNT HALDANE: They said it was a contract which is a specific thing under property and civil rghts in the Parsons' case. MR. WALLACE NESBITT: Now I want to draw your Lordships' attention to what has been said on the subject. I appreciate that the John Deere Plow case was founded on the regulation of trade and commerce. The history of that has been a peculiar one. Every attempted encroachment by the Dominion on the autonomy of the provinces has been based on that. After all the unity of the whole federation depends upon the autonomy of the provinces, and on the provinces being allowed to settle their own affairs as they seem fit, each of them being a small empire within itself. Every attempted encroachment before this Committee has been under regulation of trade and commerce. I think Lord Haldane will bear me out in that statement. I have heard it argued here to justify every possible encroachment.

VISCOUNT HALDANE: I think it has been matched by the attempts of the Committee to cut it down. MR. WALLACE NESBITT: I submit it has not been extended, but greatly narrowed. In the Parsons' case it was attempted to justify the right to carry on insurance under trade and commerce, and that they were authorized to do it, and they were deprived of a Dominion right and franchise that had been given to them. Your Lordships have before you what was said in the Parsons' case in reference to that. Then I come to the case of *Russell* v. *The Queen,* which has been discussed a good deal.

VISCOUNT HALDANE: That was again Sir Montague Smith. MR. WALLACE NESBITT: Yes. He did not put it precisely on trade and commerce under which it was argued, but that it occupied some mysterious field that was so to speak in the air between the provinces and the Dominion.

VISCOUNT HALDANE: He said it was a thing that affects the Dominion generally, and he said the Canada Temperance Act, the Scott Act, was an Act for promoting temperance all over the Dominion by regulating the purchase of drink by the people. MR. WALLACE NESBITT: Yes. Then your Lordship remembers, because you then came in it to the jurisprudence, the McCarthy Act was put forward by Sir John Macdonald to obtain throughout the Dominion complete control of the liquor traffic with all its political possibilities of favouritism, and so on, and it was entirely put forward on the ground of *Russell* v. *The Queen,* namely, by its recital it recited that the question of liquor, and the consumption of liquor, was a matter of such wide importance, and a matter of public policy, that it was a matter for the Dominion. When it came to be argued their Lordships cut down the regulation of trade and commerce, simply deciding that it could not at any rate refer to the regulation of a particular trade, and again apparently adopting the doctrine that the regulation of trade and commerce meant something in the nature of a tariff regulation, regulations with foreign countries, or inter-provincial regulations, and it was submitted that the subsection ought to be confined, and kept well locked in.

VISCOUNT HALDANE: It was not confined. MR. WALLACE NESBITT: I know it was not. No judgment was given by this Board, but merely a report to the King, and I suggest to your Lordships that it was because the judgment

could not have been written that would not have had to say *Russell* v. *The Queen* was bad law.

VISCOUNT HALDANE: It would have been in the teeth of *Russell* v. *The Queen*. MR. WALLACE NESBITT: Yes. That fell down in the way of regulation of trade and commerce. Then we come through various phases of it. I will read the past utterance of this Board in 1916, 1 Appeal Cases in the Insurance case. I ask the attention of the Committee to page 595 and following.

VISCOUNT HALDANE: It was one of the group of three cases. MR. WALLACE NESBITT: Your Lordship may remember that in that group what was argued for was that the Dominion Act was within the competence of the Dominion Legislature because of the general interest. It was tried to be justified on two grounds; first, on the ground of the general and public importance of the subject, that it had grown out of local and private matters, and, secondly, it was most strenuously argued under regulation of trade and commerce. Your Lordships held in the result that it could not be justified under trade and commerce, and that the province had a perfect right to take care of its own affairs in connection with insurance. At page 595, and the following pages, your Lordships will find what the Committee said on the subject. "It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of section 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the Provincial Legislatures by the enumeration in section 92. There is only one case, outside the heads enumerated in section 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under section 92. *Russell* v. *The Queen* is an instance of such a case."

VISCOUNT HALDANE: That is a new explanation of *Russell* v. *The Queen*, not that it was regulation of trade and commerce, but that it was regulation of trade and commerce and legislation for the peace, order and good government of Canada, so that it was not covered by section 92. MR. WALLACE NESBITT: Yes, it rather breathes a fresh light into *Russell* v. *The Queen*.

VISCOUNT HALDANE: No doubt it was an attempt to reconcile it. MR. WALLACE NESBITT: "There the Court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent cases before this Board makes it clear that it was on this ground alone, and not on the ground that the Canada Temperance Act was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee thought that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitive character on the liquor traffic throughout the Dominion. No doubt the Canada Temperance Act contemplated in certain events the use of different licensing Boards and regulations in different districts and to this extent legislated in relation to local institutions. But the Judicial Committee appear to have thought that this purpose was subordinate to a still wider and legitimate purpose of establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the Provincial Legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction."

VISCOUNT HALDANE: You see the difficulty which you are pressed with. *Russell* v. *The Queen* was so dealing with the Temperance Act which provided for the setting up of all sorts of local bodies in the provinces, which were clearly matters of a local nature, and the Committee had to find how it was consistent with *Hodge* v. *The Queen*, which had said that the setting up of these Boards for the very same purpose was a provincial task. MR. WALLACE NESBITT: It deals with the McCarthy Act.

VISCOUNT HALDANE: Yes. You had better read the next sentence. MR. WALLACE NESBITT: If your Lordship pleases: "But in *Hodge* v. *The Queen* the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario Statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board, though without giving reasons, that the Dominion Licensing Statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic through Canada, was beyond the powers conferred on the Dominion Parliament by section 91. Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in provinces."

VISCOUNT HALDANE: "Local licensing system" you observe is in *Russell* v. *The Queen*. MR. WALLACE NESBITT: Yes, it followed *Russell* v. *The Queen*, and it was supposed to be clearly within it, but it was defeated before this Board: "Their Lordships think that as the result of these decisions"—this is the point I want to make—"it must now be taken that the authority to legislate for the regulations of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. Section 4 of the Statute under consideration cannot, in their opinion, be justified under this head." Then a little further down: "Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded. Where a company is incorporated to carry on the business of insurance throughout Canada, the desires to possess rights and powers to that effect operate apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of *John Deere Plow Company* v. *Wharton*," I say that the full extent is this, that that decision expressly recognizes the right of the province to interfere in the most substantial way in the sense of saying how the trade within the province is to be carried on, how its powers are to be exercised under the general law of the province; that it may under a general law of the province go so far as to say that the powers cannot be exercised at all as in Mortmain; that they can only be exercised in a particular form of contract which the province dictates, as in the Insurance case, as in the *Bank of Toronto* v. *Lambe*, the province may tax, although the effect of the tax may be to greatly hamper the operations of the company, and it was stated in that case that they might tax so as to destroy it.

VISCOUNT HALDANE: You still have to answer the initial question, which is this: supposing the Dominion has given the company power to exercise its authority throughout Canada in every province, can the province say for no specific reason under the enumerated heads of section 92: You, the Dominion company, shall not carry on your business in this province without first registering? Supposing that were all that might affect its civil rights but there is nothing else that I remember at the moment. MR. WALLACE NESBITT: If it is connected with a tax.

VISCOUNT HALDANE: I am assuming that it is not. MR. WALLACE NESBITT: Then that is not this case.

VISCOUNT HALDANE: That is your answer, that it is not this case. MR. WALLACE NESBITT: Yes, and another answer I would give is that I would not like to answer your Lordship's question of that character without very careful thought.

VISCOUNT HALDANE: You are very well entitled to say that sufficient for yourself are the difficulties here. It is a very important question for you. MR. WALLACE NESBITT: Yes, that is why I am hesitating, but it is not this case—that is sufficient for me—and nowhere near this case.

VISCOUNT HALDANE: You have to argue that. Mr. Wegenast says it is. MR. WALLACE NESBITT: If I am right in what I have already said, my submis-

sion to your Lordships is this; that trade and commerce was carried to the very fullest extent possible by the John Deere Plow case; that the Committee have, if anything, rather receded from that in the later case, the Insurance case; that the Committee saw, I think, the danger of extending the doctrine, just as former Committees ever since 1885 have seen it. Under trade and commerce it was a species of poultice under which you can justify anything for the Dominion, and say every attempted encroachment upon the Dominion power has been made under that before the Board. I have it argued in all sorts of cases under trade and commerce. Therefore, I do ask the Committee, unless compelled by the express decision in the John Deere Plow Case, to say that trade and commerce does not cover this case. I ask your Lordships to withhold any further extension of the doctrine.

LORD PARMOOR: I suppose you say that so far as section 92 is concerned it comes within either direct taxation, or licensing for the purpose of direct taxation? MR. WALLACE NESBITT: Yes, or property and civil rights, or the administration of justice, and if you take the position taken by Mr. Blake in the Brewers and Maltsters' case everything that has been argued here for the other side as to why the license was taken out, was not considered well founded by the Committee, and I do not see how one can distinguish the Brewers and Maltsters' case from this case except on the ground that is suggested, namely, that it was a license to a particular person, and this is a license to a particular company.

LORD PARMOOR: Supposing you come under section 92 you would say you are doing nothing more than regulating the manner in which the business is being carried on in the province according to the powers conferred upon you by that section? MR. WALLACE NESBITT: Yes.

LORD PARMOOR: And without you touch status that is all you do? MR. WALLACE NESBITT: Yes, and further if I may add to what your Lordship has said that the kernel of the legislation is what you have stated, and the other section to which exception has been taken is the mere machinery for making that effective, which we surely are entitled to within the ambit of our legislative jurisdiction.

VISCOUNT HALDANE: I should not like it to go out that there was any difference in the view taken in the Insurance case and the view taken in the John Deere Plow case. I have been looking back at the John Deere Plow case. We say we agree with the interpretation of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons,* which confers exclusive power on the Dominion Parliament to make laws regulating trade. "This head must, like the expression 'Property and Civil Rights in the Province' in section 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitation should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade." We also said that the words must receive a construction like the words 'Property and Civil Rights' in what fashion they are permitted to trade. MR. WALLACE NESBITT: Then as your Lordship says: "It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation."

VISCOUNT HALDANE: What I have been suggesting to you as the interpretation of "as such" is whenever you want to interfere you interfere under some legitimate head of section 92, and that is left intact. You are interfering with a Dominion company as such; you are exercising provincial powers, and that is a very different thing from saying that you can under the powers of section 92 legislate so as to effect the status of a company as such. MR. WALLACE NES-

BITT: Or its powers. The later section says it is subject to the powers. You have a right to deal with these companies though they may be in a sense fettered, as is put in case after case——

VISCOUNT CAVE: "Power" is rather an ambiguous expression. MR. WALLACE NESBITT: It is better than "capacity."

VISCOUNT CAVE: It may only mean capacity, or it may mean authority. It might conceivably have been held in the John Deere Plow case that a Dominion company had capacity while the province is master of the authority to grant, but that was not so held. MR. WALLACE NESBITT: There is no suggestion in the John Deere Plow case that the mere prohibition of the Dominion company until it got its license affected its status. In the John Deere Plow case there cannot be from any wording of it such a doctrine as that invoked.

VISCOUNT HALDANE: You have to show it is something under the enumerated heads of section 92. MR. WALLACE NESBITT: I am coming to that. The next thing I have to deal with, having departed from trade and commerce, is the doctrine of pith and substance. Would your Lordships forgive me for describing it as the pernicious doctrine of pith and substance.

VISCOUNT HALDANE: It is a rhetorical expression for what belongs peculiarly to the Dominion. MR. WALLACE NESBITT: There is hardly anything that I can conceive that is a more dangerous doctrine to set up, for this reason.

VISCOUNT HALDANE: What does it mean? I know what the marrow of modern Divinity is, because there is a treatise on it. MR. WALLACE NESBITT: This Board started the expression.

VISCOUNT HALDANE: "Pith and substance." MR. WALLACE NESBITT: Yes, in the Bryden case. Just see the practical dangers of it. They are more or less suggested by Chief Justice Meredith, and by the way, I think your Lordship mis-construed what the Chief Justice meant, and he was expressing there a pious wish that the jurisprudence of the Court had been in the direction that he indicated.

VISCOUNT HALDANE: What I was pointing out was this: that if he had had his way the result would have been this: You would have had the provinces able to create companies with provincial objects; you would have had the Dominion with no power to create companies with extra-provincial objects, and armed with no adequate power, and you would have had a kind of corporate entity with a sort of capacity. The Ontario Legislature under the transfer of the Executive power in 1865 could create a company with provincial objects for receiving powers from authorities outside. MR. WALLACE NESBITT: I am not at all certain, after a good many years' experience, that if the limitation had been that the Dominion was confined to the type of company referred to in section 91, like banks and railway companies and so on, and the exclusive power given to the provinces, it would not have been a very much better plan in the interests of Canada.

VISCOUNT HALDANE: Supposing the provinces had only power to create companies with provincial objects, how would you then have created a company, not a railway or banking company, for extra-provincial purposes? MR. WALLACE NESBITT: They could then trade in all the other provinces by an agent, as they do in Michigan and New York. The Dominion Steel Company, the Nova Scotia Steel Company, and so on, are all provincial companies to-day.

MR. WEGENAST: Surely not. My learned friend ought not to make a statement of that kind.

MR. WALLACE NESBITT: Not only do I make that statement, but it cannot be controverted.

VISCOUNT HALDANE: Is the company that supplies the binder twine a Dominion company? MR. WALLACE NESBITT: Yes.

VISCOUNT HALDANE: That is a company which has to operate in every province of Canada. Are not the steel companies Dominion companies? MR. WALLACE NESBITT: No. The Dominion Steel Company has its great mines in Newfoundland; it has mines in Nova Scotia; its trade is throughout the world, but it is under a Provincial Statute; so is the Nova Scotia Steel Company.

VISCOUNT HALDANE: You could not have incorporated that as a Dominion company if Chief Justice Meredith had had his way. MR. WALLACE NESBITT: I point out that I think the Chief Justice was not expressing a view that that was the law, but that he wished that it was so.

VISCOUNT HALDANE: I understood that. MR. WALLACE NESBITT: On this question of pith and substance the *Bank of Toronto* v. *Lambe,* in 12 Appeal Cases, at page 586, I think, points more or less to the danger.

VISCOUNT HALDANE: What is the pith and substance unless it is this: the Dominion gave the corporation its powers. These cannot be exercised except for a defined provincial purpose. The pith and substance is something that is not struck at by any powers. MR. WALLACE NESBITT: The point I desire to make is this, that it is a very dangerous doctrine for the Court to adopt, that if you find language used by a Provincial Legislature to legislate upon a subject which is within section 92, neither this Board nor any other Court should say that they think there is an ulterior object or motive, and that is really attempting under the guise of something which is within the present ambit of the Provincial Legislature to legislate upon another subject.

VISCOUNT HALDANE: You must look and see if within the four corners of the Statute you find such a thing expressed. MR. WALLACE NESBITT: By what right ought a Court to give an intention to the Legislature?

VISCOUNT HALDANE: It is not quite that but that from the framework of the Act it may be so framed it does interfere. Then you may say the purpose is expressed to interfere. MR. WALLACE NESBITT: Might I give an extreme illustration of what I am saying. Supposing you find from a taxing section in a Ditches and Watercourses Act, my submission is that the Court must give effect if it is apt language to tax corporations to that, it being within the ambit of the provincial jurisdiction.

VISCOUNT HALDANE: If the language is apt as expressed you cannot go into the motive. MR. WALLACE NESBITT: I want to go a little further than that. I want to draw your Lordship's attention to the danger of extending that doctrine because I think the Bryden started that up.

VISCOUNT HALDANE: We had better look and see whether there is any countenance for this.

LORD PARMOOR: With regard to the words "pith and substance," after all we have to deal with what is the proper construction of the Statute. That is all it comes to. MR. WALLACE NESBITT: Yes.

LORD PARMOOR: Sometimes it is put in rather picturesque language, but the intention of the Legislature is shown in the words that it uses. MR. WALLACE NESBITT: Therefore I say if you find apt language.

VISCOUNT HALDANE: Lord Watson is describing the provisions in front of him in the Statute. MR. WALLACE NESBITT: Yes, but it has been tortured. What I am complaining of is not the decision in the Bryden case but what has been tortured into it in endeavoring to say that this Court has decided, that looking at the Act although it was really apt language for it, its real intention was to do something else.

VISCOUNT HALDANE: I think you may assume that we will not go beyond that. MR. WALLACE NESBITT: In 12 Appeal Cases at page 586 is the language and again in the Manitoba case in 1902 Appeal Cases at pages 79 and 80. I do not want to ask your Lordships' attention to Cunningham's case in 1903 Appeal Cases. That was a case with regard to Japanese. That was the case in which the subject of naturalisation and aliens was in a sub-head just the same as regulation of trade and commerce. What your Lordship said at page 156 in that case was this: the provincial legislation was impeached because it dealt with the subject of alienage and naturalization: "Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires,* such a construction of section 91, subsection 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequence of either alienage or naturalisation. It undoubtedly reserves these subjects for the exclusive jurisdic-

tion of the Dominion—that is to say, it is for the Dominion to determine;" naturalisation and so on. What I say is that the mere mention of trade and commerce and the creating of companies under peace, order and good government, coupled with that, does carry you beyond the right to trade, but subject to the consequences of the creation of status, or the creation of powers, or subject to particular valid provincial legislation may to the extent that it is necessary to enforce it cause a crippled or frittering of these powers such as in the case of naturalisation and aliens.

LORD PARMOOR: You say so long as the right to trade is preserved the Provincial Legislature may do anything they like under section 92. It all comes back to that. MR. NESBITT: Yes. I began by saying the case is in a very narrow compass: I think it is in a nutshell. What have we done in this case? I propose to deal generally with the sections, because my learned friend Mr. Geoffrey Lawrence will draw attention to the particular sections in both Acts. I say there are two heads. It is a composite Statute. You must not turn first to the licensing provision because that is something that is merely a piece of machinery to enforce the legislation under two different sub-heads. Sections 19 and 20 of the Ontario Act deals with the direct taxation in the Manitoba Act, it is section 126. Then with regard to property and civil rights licensing or administration of justice, I couple all three of those because it brings in section 135 of the Companies Act and says that is what we want.

VISCOUNT CAVE: What was your second head, taxation? MR. WALLACE NESBITT: Taxation was No. 1. I couple the three, property and civil rights, administration of justice and licensing. Let me again refer to section 135 because after all that is all that the legislation is really intended for and it is said you could have a Taxing Act. So we could if we simply want to tax corporations, but what we want is to protect the public against the evils that might flow from inability on the part of the provincial authorities to have the information before them that they could supply the people with.

VISCOUNT HALDANE: That is what you cite the Tomey Homma case for. In that case Tomey Homma was adjudged to have his general right as regards naturalisation, which was a matter for the Dominion, but they said as a consequence of his having that right the province may deal with him. MR. WALLACE NESBITT: Yes, I have strong belief, it may be a heresy, with regard to the Chinaman's case. There was a great outcry: you are shutting out Chinamen. There was a special outcry about the difficulties it made in the Far East. When you come to the Japanese case you see that they let the Japanese in, but having let him in the consequences that followed from that are for the province. But take this type of thing, as to the amount of calls made on shares for instance. Section 135 is absolutely vital to the carrying on of a corporation within the province, within Ontario at any rate. With regard to the information that is required it does not interfere with their status but it keeps them honest; at least we can see that they are kept honest. It was really intended for that like the English Companies Act. They must give the total number of debentures, share warrants, shares otherwise sold or disposed of and so on. There is no interference from beginning to end either with their powers or their capacity.

VISCOUNT HALDANE: Why need they register in order to do that? MR. WALLACE NESBITT: May I answer your Lordship's observation by saying that if they do not register how can you trace the company. If I go to search how shall I get them in the Department. What harm is there in registering?

VISCOUNT HALDANE: The harm is said to be that you are opposing a condition on the effective existence of the Dominion company. MR. WALLACE NESBITT: I answer that by your Lordship's observation in the John Deere Plow case on page 343: "It might have been competent to the registrar"—you only say it might have been—"to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes."

VISCOUNT HALDANE: "For certain limited purposes." MR. WALLACE NESBITT: To register.

VISCOUNT HALDANE: It is "For certain limited purposes." MR. WALLACE NESBITT: Yes, it is for limited purposes here such as the furnishing of information. I have called attention to the only class of information which they are asked to give. If they are entitled under property and civil rights to ask them for returns, why are not they entitled to ask them to register so that you can have an index of the companies.

VISCOUNT HALDANE: Registration is much more general here. MR. WALLACE NESBITT: I am coming to the other sections. I am only dealing with registration. I say this is a Composite Act: it deals with two different types of things, one the getting of information and requiring a license; it is not registration. We are entitled to have that. Are we entitled having the right to get that, that being within the ambit of our jurisdiction when we do not interfere with either status or capacity, can it be argued that we have not a right to require the machinery by which it will be enforced, so that any person can go and search and get the information? They require a license to be taken out so that if I want to see what Company A or Company B has done I can go and say I want to find out what its powers are, whether its stock is watered stock, or whether it is paid-up stock in real money invested in it, or whether it is promotion stock paid out for patents, good-will and the like. My only means of getting the information is to go to the Provincial Secretary's office and ask whether there is a license taken out, and then where is the information that is required under the license. The license is the mere machinery and it is within the legislative jurisdiction to require it; that is decided by the Brewers and Maltsters' case. I say if you do not do that and you do not pay the fees our method of enforcing it is to stop their doing business. There is nothing in the John Deere Plow case which says that cannot be done.

LORD PARMOOR: Assuming that the subject-matter you are dealing with is within the jurisdiction of the province, you say the rest is mere machinery. MR. WALLACE NESBITT: Yes. Section 14 gives the key-note as I say. Is it to be said it is company law when you find an enormously extended Statute relating to local corporations under the head of company law as to what can be done and this distinct separate Statute dealing only with those two branches. Is any law directed against a company to be called company law? If so we fall within the mischief.

MR. WEGENAST: That is a section of the Companies Act of Ontario.

MR. WALLACE NESBITT: Certainly it is a carrying out of the Companies Act of Ontario instead of setting it out in this, repeating the sections it is made application; so that they cannot say there is any distinction drawn. Instead of drawing any distinction between outside companies and Ontario companies, they put them all under the same category and, instead of repeating by virtue of a mere legislative enactment section 135, they say you will only have to make the same returns as we require for all companies, provincially incorporated or otherwise, and we refer to the Companies Act relating to Ontario companies as to the return you are required to make instead of repeating the section. These specific sections dealing with direct taxation are sections 19 and 20, and I say that under those we are entitled to say before you come in: pay these fees and take out a license as an indication that you have paid them.

VISCOUNT HALDANE: What is the character of sections 19 and 20? MR. WALLACE NESBITT: That they will pay the fees and take out a license. I will not pause to deal with section 5 and the other sections in detail so that your Lordships will not have any repetition by my friend who will follow me. Those sections provide clearly that there are to be no limitations. They shall get the license on application, and that would bring one naturally to the suggestion that the recital deals differently with it. In the first place the section prescribes what the regulations are which the Governor-in-Council can make, and I think it has been held over and over again by the House of Lords and your Lordships' Board that where a Statute prescribes what regulations may be made, the regulations that depart from that and go further are *ultra vires,* and pages 31 and 32 contain regulations that refer to Dominion companies.

LORD PARMOOR: What page is that? MR. WALLACE NESBITT: It is M., those are the regulations that we referred to. It is pages 31 and 32 what Sir John Simon referred to. If you look at page 32 you will see the cases of licenses to Dominion companies is expressly dealt with under that particular head and as a matter of construction I would submit that that is one that governs, at any rate the one that governs in practice, and I fancy the real solution of the matter is that these later ones are the earmarks of the original legislation before the Statute was amended by which it was provided that no limitation could be put on. Your Lordships will remember there was an amendment to the Ontario Acts by which no limitation could be put on but if the provisions on pages 30 and 31 are *ultra vires* of the Department's officers and not authorised by section 10 and they do not purport to be authorised by the Governor-in-Council, if you look at page 26 you will see that they are simply headed regulations of the department, and I have been unable to find anything that would justify the observation that they are under Order-in-Council.

MR. WEGENAST: It was admitted by Counsel on the other side at the trial that they are included in this Record by the consent of the solicitors. The contents of the Record were agreed between them.

MR. WALLACE NESBITT: I have not heard of any admission here, it is not in the Record and it is headed Regulations of the Department, and in any event, as I say 31 and 32 are not, so far as they impinge upon this, authorised by section 10 of the Act.

Now let me deal with Manitoba for a moment. It is said there is a limitation in Manitoba by reason of the language of section 111. I should have thought the proper construction of section 111 was this. It is said that section 111 does import limitations and conditions into the license in Manitoba. If you look at section 109: "A corporation coming within Class V. shall, upon complying with the provisions of this part and the regulations made hereunder, receive a license to carry on its business and exercise its powers in Manitoba." Then section 110 deals with other extra-provincial companies and they may receive a license. That is, they are not bound to give them a license; it is within their discretion—"and exercise the whole or such parts of its powers" are the words. The words of section 109: "Receive a license to carry on its business and to exercise its powers." That is most simple and wide in the case of Dominion corporations but they may also give in the case of others the right to exercise a portion of their powers, and they may only receive a license "subject, however, to such limits and conditions as may be specified therein," that is in the license.

VISCOUNT HALDANE: Section 109 arrogates to the Manitoba legislature the power to say whether or not a Dominion company may carry on business in Manitoba. MR. WALLACE NESBITT: Section 109?

VISCOUNT HALDANE: Yes: "A corporation coming within class V. shall, upon complying with the provisions of this part and the regulations made hereunder, receive a license to carry on its business and exercise its powers in Manitoba." MR. WALLACE NESBITT: And the regulations do not attempt to put in any limitations.

VISCOUNT HALDANE: The words are "receive a license" in section 110, but the Act says in effect you cannot do it without a license. MR. WALLACE NESBITT: That is so but they shall receive it. I quite agree as to that.

VISCOUNT HALDANE: They say we bind ourselves to give it but you cannot do it without. MR. WALLACE NESBITT: Quite so, my Lord. Then section 111. What is pointed out in the last three lines is this: "subject, however, to the provisions of this part and to such limitations and conditions as may be specified in the license." Our submission is, and it has been held in the Supreme Court by Mr. Justice Anglin and in the Court of Appeal by Mr. Justice Cameron, that to give a fair reading to the Act that those words refer to, subject, however, to such limitations as are in section 110, and refer to the corporation specified there and do not refer to section 110. Otherwise there would be a complete contradiction in the Act.

VISCOUNT CAVE: I have not yet found the powers to make these regulations. MR. WALLACE NESBITT: Your Lordship will not find anything but that is the

implication. I have gone through the Act. It has been continually suggested that there is a discrimination against Dominion companies. Chief Justice Meredith says, and I cannot add anything to how he has put it, that is, it is fees charged for the privilege, as was put in the Brewers and Maltsters' case, of carrying on business. The fees charged to both companies are the same. It is true that the license to the provincial company is embraced in the incorporation but *qua* the Dominion company when it comes to the province it may have been incorporated for nothing for all we know, but whatever it is charged for carrying on business in the province is, as is put by the Chief Justice, charged to the local companies. If it is thought by the Dominion that it is a very important matter to create juristic bodies just as it is thought by them important to obtain settlers and give large bonuses by way of free lands to them they will incorporate them and start them on their way rejoicing. If on the other hand it is thought a good thing to charge them, that is nothing to do with the province as such in dealing with other companies on the same footing, that is to say, you pay your footing and that allows you to do business within the province and carry on business in whatever way you see fit. So long as you comply with the terms of your own charter we only require certain information, but we want this as a piece of machinery; it will take the form of license. We ask for that more in the interests of the public. The license being something that can be registered you can keep trace of the company and get all the information as to how the stock has been issued, what it has spent on patents, promotion expenses, or whatever it may be. In other words, you can get information as to the solvency of the company, as to the desirability of buying its stock on the market and so on. As to which jurisdiction it is thought best to incorporate under I fancy it is a matter always of discretion as to the powers that you want in the meantime if your company after it is incorporated there is what I referred to about the holding of meetings and so on. For instance, one marked difference that one has had drawn to one's attention to since coming here is this, if you get a by-law authorising the directors, the general body of shareholders, 66 per cent. of them to borrow money from time to time in Ontario, for instance—I do not know how it is in other provinces—if you had to issue a fresh set of bonds you would have to get each one of those transactions adopted by your shareholders, the theory being that they had better know how the company is going on than to give a general power of attorney to borrow. It might be that gentlemen incorporating might want such a power in one case (or might say we not only do not want, but will not have a power existing for the others. There are differences and very marked differences in point of fact between the various provincial methods of dealing with the internal management of the company. With that we have nothing to do, but as to where they incorporate it must be a matter of discretion with them, but once they get their name and their power we never interfere with them except to say you may come into the province, we want you to pay a fee, in connection with that we will issue a paper; you may call it a license or anything you please, it is a piece of machinery that identifies them like a motor-car is identified; it is registered so to speak and you can make your search and get the information that it is vital for the people of the province to have, and they should have the right of regulation. So that I do submit it would be a very serious matter for the Committee to hold that we could not as part of that insist upon them before they come in taking out the necessary papers and machinery to enable them to operate under section 92 in any one of the three heads and carry it out in that way. I submit that your Lordships should certainly not go out of your way to say when you find such a broad distinction between these and the John Deere Plow case, we did not allow them to come in unless entirely at the discretion of the registrar, and again afterwards at the discretion of the Governor-in-Council, and we also contend for a definite difference between this legislation and that of British Columbia. Your Lordships apparently did not think much of it when suggested to you, namely that under the British Columbia legislation a Dominion company could not do a dollar's worth of its business in the province.

Viscount Haldane: You are speaking of Manitoba? Mr. Wallace Nesbitt: Both Ontario and Manitoba. Under the British Columbia legislation the Dominion company could not do a dollar's worth of business in the province;

could not sue in the Courts and they could not collect a dollar for any business they had done within the province. Now both in Ontario and Manitoba the legislation does not require this license to be taken out unless and until the company becomes resident in the province. That is to say, it can carry on business as it sees fit by way of mail order; by way of commercial travellers; it can sue for any business it so carries on and no questions are asked, but when it desires to become resident in the province then we say, take out a license so that we may register you so that we may know this, that and the other.

VISCOUNT CAVE: Do you say it can sue? MR. WALLACE NESBITT: I think so, yes.

VISCOUNT CAVE: An unlicensed company? MR. WALLACE NESBITT: An unlicensed company can sue where it has done business by its travellers; I so read it.

MR. WEGENAST: It could in British Columbia under the *John Deere Plow* v. *Agnew*.

MR. WALLACE NESBITT: I know nothing about *John Deere Plow* v. *Agnew* except that one judge did say that carrying on business meant so and so. It was not the decision of the Court as I understand it. Certainly it is that by the Statute that broad distinction is made so that that makes the three distinctions.

LORD PARMOOR: If you had a Dominion company which does not seek to have any residence in Manitoba or Ontario, but their travellers or agents made contracts there, you say they can enforce their contracts under this in the ordinary way? MR. WALLACE NESBITT: Yes.

VISCOUNT CAVE: What is the distinction between British Columbia and Manitoba? MR. WALLACE NESBITT: You may have to go to other sections for that. Would your Lordships allow my friend Mr. Geoffrey Lawrence to deal with that?

VISCOUNT CAVE: As you please. If this document is right there is no distinction at all. MR. WALLACE NESBITT: I have not checked this document up. I may say this, we should be very glad if your Lordships would favor the province so as to end this interminable litigation that has been going on since 1906. As Chief Justice Meredith pointed out, there may be something that you may think beyond their powers and if so that can easily be remedied if it is pointed out and it would be a public blessing if this could be got an end to. Therefore I should ask your Lordships to consider that.

LORD SUMNER: I do not think it would be confined to Canada, the blessing I mean. MR. WALLACE NESBITT: I said a public blessing, which embraces everyone in the Empire, I suppose. I think your Lordships have been troubled with this case so long that I do not propose to trouble your Lordships further.

LORD SUMNER: May I ask you a question before you sit down. There is nothing shewn that there is some practical object in issuing licenses or the form of license. It is said it serves a form of receipt for taxes paid. I gather you say it serves the purposes of index to the company information and there may be other purposes, but what is the practical advantage of carrying out a receipt for money and an index to the company's information in the form of a license or permission? MR. WALLACE NESBITT: I really cannot answer that except that it was the form that the legislation took in the Brewers and Maltsters' case where they required them to take out a license. It may be it followed that. I do not know how that could very well do it; in a sense it is a license whichever way you put it; that they must make this payment and they must accept something that acts as a receipt.

LORD SUMNER: When you pay you get a receipt for the money called a receipt; when you deliver your information it is put upon a file and the company delivers the information, has its name put in an alphabetical register and then you get your index. I have not yet appreciated if it is material or what the particular advantage is of having a license. MR. WALLACE NESBITT: That I cannot tell your Lordship, I do not know how they deal with it from the practical side; I really do not know.

LORD SUMNER: It is obvious that a good part of the appellant's argument arises out of the suggestion that a license, a permission, and a permission to do

something which according to the appellant's argument is no permission and that therefore it is objectionable. MR. WALLACE NESBITT: Then it cannot harm him.

LORD SUMNER: Nor could it have harmed the province to have called it a receipt and got rid of the objection. MR. WALLACE NESBITT: I agree; it cannot harm him to take it in the form of a license, as in the Brewers and Maltsters' case.

LORD SUMNER: If this great constitutional question ultimately turns out to rest only upon the right of the province to give a receipt for money and call it a license, or the Dominion company to pay its money and not submit to receiving a license in return, it does not seem to me quite so substantial as one would have expected. MR. WALLACE NESBITT: I have never thought that it is very substantial because the only complaint is this: They cannot complain about receiving a license, and the only complaint is payment of the money. They say because they have to pay 50 dollars or 200 dollars, or 50 dollars, or whatever it may be, it puts them at a disadvantage with a provincial company, apparently that is all. The only complaint that has ever been made. I do not think they would care two pence whether they took it in the form of a license or not, if they did not have to pay the money.

MR. WEGVNAST: Yes, surely.

MR. WALLACE NESBITT: I am sorry I cannot answer Lord Sumner's question; I do not know the forms the license takes, but we say it is a piece of machinery that has received the judicial sanction of this Court, and it is well within the ambit of the legislation, and it does not, as in the John Deere Plow case, it apparently did, interfere with the status and so on. I submit that you cannot apply the doctrine that the object of the legislation is sometimes other than that which is apparent on its face.

MR. GEOFFREY LAWRENCE: My Lords, as my friend has been over the ground at such length I shall try to be very short, and I have to deal with the points very shortly, and the points on which he has not touched.

VISCOUNT HALDANE: I think we have got the main points very distinctly before us now, so that you may deal with the subsidiary things which have not been touched upon. MR. GEOFFREY LAWRENCE: I hope your Lordships will forgive me if I put one general consideration which appears to be very material. Your Lordship indicated as a difficulty which might arise in regard to the provinces that it was difficult to justify the registration provisions of these Acts under any clause in section 92. Now, my Lords, I submit to your Lordships that the true way to look at that is to consider this legislation as if the prohibitory clauses and the penalty clauses were not in it at all; to consider the Acts of the provinces which simply impose upon Dominion companies, in common with other companies, the necessity of registering and giving certain information. If there is any difficulty in supporting such legislation as that your Lordships have got to affirm as a positive proposition that it is not within the competence of the Provincial Legislatures to order all companies to make a general Act, making it obligatory upon all companies to register in the province.

My Lords, I respectfully submit that is a very strong proposition to lay down, to say that the Provincial Legislatures have not under the power to make laws the exclusive power to make laws for property and civil rights, for the Administration of Justice and for matters of a purely local nature—to say that they have not under those powers the right to require information from companies or the right to require registration by companies is a proposition which I submit to your Lordships ought not to be laid down. Now, my Lords, if this is so, when you look at it in that way, then you have only to see whether there is anything which is *ultra vires* in the penalty clauses of the Statutes, which are inserted for the purposes of enforcing licensing and informatory legislation which I submit is clearly *intra vires*. My Lords, upon that I submit that the principle of the thing is the provisions in section 92(15) of the British North America Act, which gives exclusive power to the province to deal with punishment by way of penalty, and if authority is necessary, the authority is that of the Brewers and Maltsters' case, where the Ontario Act, which was upheld, in absolute terms prohibited any person from carrying on business until he had taken out the license required by the Ontario Act. Now, my Lords, on that I desire to adopt with very great respect the observation which fell

from Lord Haldane during the course of the argument for the appellants. Lord Haldane said that no doubt the Dominion could set up Dominion corporations and give them the powers of natural persons. My Lords, if that is the power of the Dominion the case of Brewers and Maltsters, I submit to your Lordships is indistinguishable from this case. It is true that the Dominion legislation in question there simply gave a license to make fermented liquors.

VISCOUNT HALDANE: Will you give me the year of that case; the year in the Appeal Cases? MR. GEOFFREY LAWRENCE: It is 1897, Appeal Cases, my Lord.

VISCOUNT HALDANE: I do not want you to refer to it now, but we will look at it. MR. GEOFFREY LAWRENCE: The only distinction which is sought to be made between that case and this is, that was not the case of a company, but a case of natural licensees. I submit that there is nothing in that, and I respectfully submit to your Lordships that one may test it in this way, and one can see how that case fits in with the John Deere Plow Company's case. I submit it would be perfectly competent legislation for the Dominion under section 91(2) under the power to make laws for trade and commerce, to say to the province: any Canadian subject shall be entitled to trade as of right throughout the Dominion. I submit to your Lordships that that is competent legislation under trade and commerce; that they can say that any Canadian subject has the right to trade throughout the Dominion. If they said that, my Lords, and that is practically what they have said in the Brewers and Maltsters' case, so far as brewers were concerned, then, my Lords, the individuals in such circumstances would have the right to trade within the whole of the Dominion, but they would be subject to such licensing legislation as was in question in the Brewers and Maltsters' case. They would be bound to pay the license fees imposed by such legislation and they could not, although licensed by the Dominion, carry on their trade till they had paid those fees. That is exactly the state of affairs which was in question in the John Deere Plow Company's case. There the legislation, the British Columbia legislation, denied the right which was conferred by the Dominion to carry on business—I do not use the word "capacity" or "power." It appears to my mind clear to say that they had got the right, and what I understand your Lordships to decide in that case was that under trade and commerce, the Dominion had given Dominion corporations the right to trade, and your Lordships held the legislation there was *ultra vires* because it denied the right to Dominion companies to trade as if they were incorporated.

My Lords, that brings me to the Acts in this case, and I submit to your Lordships that both the Ontario and Manitoba Acts do not deny the right to trade as incorporated. They recognise it.

LORD PARMOOR: We will take your view. It would be like the Provincial Parliament saying to an individual to whom the Dominion had given the right to trade: you are not to trade without a license. MR. GEOFLREY LAWRENCE: Yes, they had not the right to trade as incorporated. That is the essential difference. Now in regard to these Acts which your Lordships have had very fully before you, I submit that they recognise the right of the Dominion corporations to trade as such. My Lords, it may be that the form of these Acts is not the most desirable form that could have been evolved. Your Lordships will remember a passage in the case of the Attorney-General for the Dominion and the Attorney-General for Manitoba, I think, to which Lord Haldane drew attention this morning, which said that although provisions of the provincial enactments might, however carefully framed, appear to trench upon the Dominion subject, yet if they fell within section 92 they were valid legislation.

Now, no doubt the use of the word "license" is historical, because, as was pointed out by Mr. Justice Cameron in the Court of Appeal for Manitoba, this sort of legislation, not it is true applying to all companies, but as applying to loan companies, has been in force in the province since the year 1877, and the word "license" has been used in that legislation ever since 1877. It may be, my Lords, that the word "license" is objectionable in point of form, but surely your Lordships will look at the substance. The substance is that they are entitled to the licenses as of right, and whether or not it is called a license it really makes no difference whatever.

Now, taking the Manitoba Statute, first of all, it provides by section 109 that: "A corporation coming within clause 5"—that is, a Dominion corporation—"shall, upon complying with the provisions of this part, and the regulations made hereunder, receive a license to carry on its business and exercise its powers in Manitoba." That is to say, they are entitled as of right to that license. Then section 110 draws a sharp distinction in favour of Dominion corporations, and as against other extra-provincial corporations: "A corporation coming within Class VI."—that is, another, extra-provincial corporation, not a Dominion corporation—"may upon complying with the provisions of this part and the regulations made hereunder, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Manitoba as may be embraced in the license; subject, however, to such limitations and conditions as may be specified therein." Your Lordships will notice the words: "its powers" in section 109—its business and its powers. It clearly contemplates that the Dominion company is to carry on the whole powers which are conferred upon it, and then in section 110 it contemplates that the powers of the other extra-provincial corporations may be cut down, that it may only have the power to carry on such part of its business, such part as is limited in the license. There your Lordships get a true license, not the receipt such as my friend, Mr. Nesbitt, has referred to, which is the real meaning of section 109. You get the true license, and it was the true license your Lordships had to deal with in the John Deere Plow Company's case. Then turning to section 111, I submit, as my friend has submitted, that the words at the end there: "subject, however, to the provisions of this part, and to such limitations and conditions as may be specified in the license," clearly only apply to the provisions of section 110, to corporations other than Dominion corporations which may be limited in their license. Any limitation in a Dominion license would clearly be *ultra vires* of section 109.

Now, my Lords, I pass on to section 114, which I may mention in passing, deals with a power of attorney, and that is a power of attorney which is to be given to the representatives of the Dominion corporation in the province; that is clearly, I submit, for the purpose of administration of justice. That is in order that service of process may be made conveniently upon a company in the province. Then section 115 is the proof of the compliance with the Act. Section 117 is mere machinery, the notice of the license; and section 118 is the prohibition, which does prohibit the company, as I submit, it is clearly *intra vires* for the province to do, until it gets a license. Then section 120 is the section which deals with the returns and which is practically similar to the Ontario section 14, because it provides that the company shall make the same returns as other Manitoba companies have to make under the Manitoba Act.

Then section 121 gives the Lieutenant-Governor a power to suspend the license if the Act is not complied with. Then section 122 is with regard to the question of penalties, and it provides that it: "shall not be capable of maintaining any action," and section 123 is another penalty section. Section 124 gives the Lieutenant-Governor-in-Council power to remit the penalties, and section 125 deals with the recovery of penalties.

Now I come to section 126 which deals with the question of fees, and I just desire to draw your Lordships' attention to that section, which provides that: "such corporation shall pay to His Majesty for the public use of Manitoba such fees as may be fixed by the Lieutenant-Governor-in-Council, and no license shall be issued until the fee therefor is paid." Now the learned counsel for the appellants have made a considerable attack upon some scheme which they see in this legislation for discriminating against the Dominion companies. I do not think that they draw your Lordships' attention to the proviso in this section, which goes on to say: "Provided that with respect to a corporation carrying on outside of Manitoba an established business, when applying for a license under this part, the Lieutenant Governor-in-Council may reduce the fee payable for such license to such sum as he may think just, having regard to the nature and importance of the business proposed to be carried on in Manitoba and the amount of capital proposed to be used therein." My Lord, that is an opportunity, and it is an opportunity which I submit the Lieutenant-Governor-in-Council must avail himself of, to treat Dominion corporations in a favourable way, and let them off some of the fee because they have a

capital which is subscribed for the purposes of the business throughout the Dominion.

MR. WEGENAST: The Lieutenant-Governor definitely and consistently refused to do that very thing.

MR. GEOFFREY LAWRENCE: I object to my learned friend making observations of that sort. There is absolutely no evidence before your Lordships as to what the Lieutenant-Governor-in-Council has done, and if my learned friend intended to make such a case he should have proved it.

VISCOUNT HALDANE: We are only concerned with what the Statute says. MR. GEOFFREY LAWRENCE: If your Lordship pleases. Now that brings to an end the Manitoba Act. The Ontario Act is substantially the same. There again the corresponding section to section 109 is section 5, and you get the same contrast between Dominion companies and other extra-provincial companies, as shown by sections 5 and 6. Section 5 is: "A corporation coming within class 7 or 8 shall, upon complying with the provisions of this Act and the regulations, receive a license to carry on its business and exercise its powers in Ontario." There you get again the words: "its business" and "its powers." It is entitled as of right. Then section 6 is: "A corporation coming within class 9 may, upon complying with the provisions of this Act and the regulations, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Ontario as may be embraced in the license; subject, however, to such limitations and conditions as may be specified therein." Then your Lordships get in section 9, subsection 2, an affirmative provision in the Ontario Act which was added in the year 1901, that: "No limitations or conditions shall be included in any such license which would limit the rights of a corporation coming within class 7 or class 8" as distinguished from class 9. Then, my Lords, my learned friend Mr. Nesbitt has pointed out to your Lordships that section 10, which is the section which gives the Lieutenant-Governor-in-Council the power to make regulations, gives him no such power as appears to have been exercised in those department regulations to which objection is taken. Then, my Lords, section 14 is with regard to the returns which have to be made by licensees. Section 15 is with regard to the suspension of the license, if the Act is not complied with. Section 16 is the penalty clause. Section 17 is with regard to the power to remit penalties or costs. Sections 19 and 20 are with regard to the fees which are to be paid, and they are absolute in terms. Section 19 states: "There shall be paid to His Majesty for the public uses of Ontario for every license under this Act, such fees as may be prescribed by the Lieutenant-Governor-in-Council." My Lords, again an attack was made that there was discrimination against the Dominion companies, and I desire shortly to draw your Lordships' attention to the fact that on the contrary there is a discrimination in favour of Dominion companies. If your Lordships will look at M. page 21, which I will read to your Lordships, your Lordships will see the original order in council. It is about line 27, the original order in council of the 7th December, 1909, which provided various fees for Ontario corporations, one of which was: "When the proposed capital is more than 1,000,000 dollars the fee shall be 385 dollars for the first 1,000,000 dollars and 2.50 dollars for every 10,000 dollars or fractional part thereof in excess of 1,000,000 dollars." Now if your Lordships will turn over to page 22 at line 30 your Lordships will see that in the case of Dominion companies "except in the case of Dominion corporations, which pay either 25 dollars or 50 dollars. If the company's capital is 100,000 dollars or less, the fee is 25 dollars. If the capital exceeds 100,000 dollars the fee is 50 dollars." Now it is perfectly true that has been superseded apparently by the next page, page 24, but that shows your Lordships that up to that time, at any rate, there was no discrimination against; but on the other hand, there was a discrimination in favour of the Dominion companies. On page 24, my Lords, which is the regulation now in force, it provides: "'Fees for licenses will be the same as the fees charged for the incorporation of companies under the Ontario Companies Act, but will be calculated on the amount of capital authorised to be used in Ontario.'" There again your Lordships see that so far from there being discrimination against any Dominion companies there is a discrimination in favour of the Dominion companies. The only discrimination,

my Lords, which is complained of in this case, as I understand it, is a discrimination in regard to fees.

Now, my Lords, we justify the fees by the power to tax, and where you are considering the power of Provincial Legislature to tax it is perfectly obvious, and it has been laid down by the case of the *Bank of Toronto* v. *Lambe* that the Provincial Legislature can discriminate as much as it likes, and it was equally assumed in the Brewers and Maltsters' case. As my learned friend pointed out to your Lordships, the third question there put to your Lordships was whether or not there could be discrimination as between the various brewers, and the case was considered to be so hopeless by Mr. Edward Blake that he did not argue it, and the question was answered in the way in which it had been answered in the Court below, namely, that the province has got a power to discriminate, so that if the complaint is with regard to the discrimination as to taxation, I submit it is perfectly clear that does not make it bad, and that the only way in which my learned friend can make use of his argument about discrimination is to show that this Act was really not a taxation Act at all, and was not an Act dealing with registration and information, but was an Act designed to prevent Dominion incorporation. If that is the issue before your Lordships I venture to think that your Lordships have to decide it upon most inadequate material. It becomes a question really similar to a question of deciding about a case of undue preference under the Railway and Canal Traffic Act or something of that sort. It was suggested in argument that because the province does a greater service for the provincial company by incorporating it, and charges the same fee to a Dominion company, that, therefore, there was a discrimination against Dominion companies. Well, I submit to your Lordships that you have not got here the facts upon which such an issue as that can be decided.

Lord Parmoor: Undue preference is dealt with under statutory provisions against it. It is not a question there of the intent of the Statute as apart from the provisions. Mr. Geoffrey Lawrence: No, my Lord.

Lord Parmoor: I do not know how you are to go into the intent of it, apart from what the Statute tells you. The Statute expresses the will of the Legislature. Mr. Geoffrey Lawrence: Yes, my Lord, and as was pointed out in the *Bank of Toronto* v. *Lambe,* although the tax might be such as to crush banks out of existence, it was not for the Courts to question the exercise of such supreme powers.

My Lords, for those reasons I submit this appeal should be dismissed.

Viscount Haldane: Now, Mr. Henn Collins, you appear for the Province of Saskatchewan? Mr. Henn Collins: Yes, my Lord.

Viscount Haldane: I presume you do not intend to cover the same ground? Mr. Henn Collins: If I may, my Lord, I want to add one word on the general principle as it affects the particular province which I represent, and if I might then deal with the legislation, and point out how it supports the proposition, if my proposition is well founded?

Viscount Haldane: You might remember that we have had all these things argued very fully by two counsel. Mr. Henn Collins: Yes, my Lord, I quite conceive my function, while adopting their argument, is to avoid any repetition. I will bear that most strictly in mind.

Now, my Lords, what I want to say first of all is this, that in my submission the word status has been used very often during this discussion without sufficiently distinguishing the two senses in which it can be used. My Lords, in one sense status means the sum total of the powers, the capacities, which are conferred upon a company by incorporation measured by the same measures that you would adopt if you were testing whether the act were *intra vires* or *ultra vires.* That is one sense, and it is in that sense I venture to think the appellants have been using it, and that is not the material sense here. The other sense in which it is used is this: Of that sum total, those powers which may lawfully be exercised by the generality of persons of that class in the particular province in which it is proposed to exercise them—it is only in that sense that status enters into the discussion to-day at all. If I might make that a little bit clearer; if you take it in the first sense, the widest sense, then it must follow that the Dominion by incorporating the company can determine what civil rights it shall exercise in the province, and you get the clearest possible infringement.

VISCOUNT HALDANE: Let us see if we can put your alternatives. Status means: all powers? MR. HENN COLLINS: Yes, all powers. The phrase capacity is not inconvenient for that purpose.

VISCOUNT HALDANE: Powers and capacities? MR. HENN COLLINS: Yes, my Lord, powers and capacities.

VISCOUNT HALDANE: Then the alternative construction of the word is what? MR. HENN COLLINS: That part of those powers which can lawfully be exercised by the generality of persons in the particular province in which it is proposed to exercise them.

VISCOUNT HALDANE: That part of those powers which can lawfully be exercised by the geneality of persons in the particular province? MR. HENN COLLINS: Yes, my Lord. The measure of the first test, of course, would be whether the Act is *intra vires* of the company.

VISCOUNT HALDANE: The second is mere analogy? MR. HENN COLLINS: My Lord, it is a combination of two things. Of course, you must start with the powers in the sense that they are *intra vires,* and then you must regard the sovereign rights of the province to say what the civil rights of a person of that status shall be.

VISCOUNT HALDANE: But when you introduce generality you mean shortly this: There is a class of person, natural and artificial, exercising such powers in the province? Very well. What powers the Dominion has analogous to those belong to the status? MR. HENN COLLINS: The province could clearly distinguish between a natural and artificial person. It could give one measure of civil rights to one class of person and another measure to the other.

VISCOUNT HALDANE: Of course. MR. HENN COLLINS: That is why I use the term "generality of persons of that class," meaning artificial persons.

VISCOUNT HALDANE: It is the analogy of the persons of that class that determines what belongs to the status of the Dominion company? MR. HENN COLLINS: Yes, my Lord; status in other words is a co-relation. One must look at it from the point of view of the company or the province; it is a co-relation of the two. Of course, status in the first and wider sense is wholly unimportant in this discussion, because it must be conceded at once that the Dominion Legislature cannot assume to confer on a company civil rights which the province itself does not confer on artificial persons. The simplest instances is Mortmain. I only mention that because it has been mentioned in the case, and it is a conspicuous instance. In my submission the foundation of the distinctions which run through all these cases is Aye and No, has there been any differentiation? That is the obverse of the view I am putting. Once you get generality, and determine what the rights of the corporation, of the entity, are by relation to the analogous rights of similar parties in the province—when that is done, then you have determined the status *qua* that province, and it is not until you get an interference with the status so defined that you get that which is objectionable.

Now, my Lords, the John Deere Plow Company's case did not go further than that. You had there a discrimination against Dominion companies; they were treated on a wholly different footing from the local companies. And that, in my submission, my Lord, is what underlies such phrases as "the company as such," and reference to general legislation—such phrases as that.

Now, my Lords, that is all I desire to say upon the general proposition, because if that proposition is sound then the only line of attack which has been used against my legislation falls to the ground, whereas the other provinces are attacked because they discriminate. I understand that I am attacked because I do not discriminate. My Lords, that inconsistency may be justified, but it is a little difficult I venture to think to reconcile those two views. It is quite clear, my Lords, in my submission, that the appellant's view that I do not discriminate is very well founded, because clearly the intention was to treat all the companies alike. But, my Lords, the attack is put in a slightly different way. It is said that the effect of my act is to make a Dominion company amenable to the detailed company provisions in my Act. That is all founded—and this is the thread upon which the whole thing hangs—on the definition in section 3: "company" means

....a company incorporated"—that would be a local company—"or registered under this Act."

VISCOUNT HALDANE: Which section is that? MR. HENN COLLINS: That is section 3, sub-section 1, my Lord. A company registered under this Act would no doubt include a Dominion company, but, my Lords, that definition is prefaced by the words: "unless the context otherwise requires." If the effect then of reading these sections as applying to a Dominion company is to make them *ultra vires,* then within the definition the context would require them to be read otherwise. That, of course, is perhaps a narrow ground on which to put it, but on a canon of construction one would always read a section of being *intra vires,* giving it the sense which was *intra vires* rather than a sense which was *ultra vires.* Therefore, in so far as any criticism is founded on the fact that the sections refer to both kinds of companies and apply certain company provisions to both, my answer is that you must read those sections as applying only to those the Provincial Legislature had power to apply them.

Now, my Lords, I think I can deal very shortly with the provisions of the Act, because the scheme of the Act has been pointed out. Now, very shortly, it is this. The company becomes incorporated—the local company becomes incorporated on the filing of the memorandum. That is section 19, and from the date of the incorporation it becomes capable forthwith of exercising all the functions of an incorporated company and having perpetual succession and a common seal, with power to hold lands. But at that moment it either can or cannot do business. I do not care which you call it, but it must be registered, or pay a fine for not being registered. That is the local company I am now speaking of. Therefore, up to the moment when the registration and the payment of the fee on registration has to be made, both the provincial and the Dominion company start equal—if I may use the expression, they start from scratch. Both are clothed with their capacities in the broadest sense; and they must do something more, namely, register, and from that moment they can carry on their business.

My Lords, section 25, sub-section 3, is this. Perhaps I am going a little bit too fast, I was skipping section 23. I only pause there to point out that that again contains a provision which makes it clear that carrying on business within the meaning of the Act refers to carrying on in the sense of residing there. Sub-section 3 excepts from the provision as to registration, and it provides that: "The taking of orders by travellers for goods, wares and merchandise to be subsequently imported into Saskatchewan to fill such orders, or the buying or selling of such goods, wares or merchandise by correspondence, if the company has no resident agent or representative and no warehouse, office or place of business in Saskatchewan, shall not be deemed to be carrying on business within the meaning of this Act." Therefore, it is the carrying on of a business as a resident that is aimed at. Then section 24 is as follows: "Any company may become registered in Saskatchewan for any lawful purpose on compliance with the provisions of this Act, and on payment of the fees prescribed"—prescribed in the regulations; I think it is conceded, and I do not think it requires any argument from me that that "may" must be read as "must." It is quite obvious if your Lordships look at the second part of the section which gives the Lieutenant-Governor-in-Council, in the case of local companies other than Dominion companies, power to refuse registration, and, therefore, when you say they may become registered on payment of a fee, I think it is quite clear that they "must." If it be clear in that section, it must be quite clear in my submission in section 25 which is the one dealing with the provisions with a license: "Every company may, upon complying with the provisions of this Act and the regulations, and every mutual insurance company may, receive a license from the Registrar to carry on its business and exercise its powers in Saskatchewan."

VISCOUNT CAVE: The words are different there, and they are probably stronger for your purpose. In section 24 it is "any company" and here it is "every company." MR. HENN COLLINS: Yes, my Lord, I am obliged. I think it rather enforces it. It is "every company" in section 25. I think sub-section 3 is the only one I need refer to: "A company receiving a license from the Registrar may, subject to the provisions of its charter, Act,

or other instrument creating it, carry on its business to the same extent as if it had been incorporated under this Act." My learned friend Mr. Wegenast made some complaint of that section as a discrimination, I gather, against a Dominion company, or at any rate as showing that we purported to confer upon it powers which it already had. The true relation of that section is only this, in my submission, that without it, it would not be entitled to hold land under the Mortmain Acts. It is a reference to the section 19 which as soon as a company is incorporated, and every company is incorporated, gives a power to hold land. That is the sole effect of that.

Now, my Lords, comment was made upon, and I think I can pass straight to section 29, because that is the next one on which I was attacked, and particularly sub-section 2. The first sub-section deals with the case of where the Registrar has reason to believe the business was not being carried on. and it provides that: "He shall send to the registered office of the company by post a letter enquiring whether the company is carrying on business or in operation, and if he does not receive an answer thereto within one month of sending such letter," within 1. days of warning them, they may be struck off if they do not reply. Then sub-section 2 is: "If the Registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or if he receives no answer thereto, he may publish in *The Saskatchewan Gazette* a notice that, at the expiration of three months from the date of that notice, unless cause is shown to the contrary, the name of the company will be struck off the register and the company.....dissolved." Those are the words, of course, on which the appellants fasten. My submission on that is that you must read those words on the canon of construction which I pointed out just now as referring to a company which it would be within the competence of the local Legislature to dissolve, and can have no reference to a company which it would have no power to interfere with at all.

My Lords, it was also said—and I think this is the last attack I need deal with—that we purported to control the name in which the company would carry on. My Lords, there are two sections which are relevant to that.

Viscount Cave: There were other sections referred to, section 32 for instance, and section 39. Mr. Henn Collins: I am obliged to your Lordship. Perhaps I had better deal with those first of all. I did not desire to deal with those in detail because they all fall, in my submission, under the general proposition that you must read "company" as referring only to that kind of company which it would be competent for the local Legislature to make these enactments in respect of. That is to say, if you have an enactment dealing with what the interest of shareholders are to be, and so on, that is obviously a matter which the Dominion Legislature has already dealt with, and is not within the consequence of the Provincial Legislature. Therefore, you read the section as applying only to the local company.

Viscount Haldane: If on construction these sections do apply to an extra-provincial company, they are to that extent *ultra vires*? That is what is said? Mr. Henn Collins: Exactly, my Lord.

Viscount Haldane: Not on construction? Mr. Henn Collins: No. I quite see the point. There is yet a third answer to it. And, my Lords, perhaps while I am upon that point I might add this: so far as this case is concerned it is enough for my learned friend to point out that some of the consequences which may follow from registration are *ultra vires* the provinces, without showing the registration itself is *ultra vires*. It is not enough for me to say: well, if you object to the consequences of registration I will not insist upon it, but I will insist upon registration and the payment of the fee that is required on registration.

Viscount Haldane: Which two sections do you say illustrate what your argument is? Mr. Henn Collins: The two sections I say are sections 23 and 25.

Viscount Cave: You illustrate what you were saying on section 29. Mr. Henn Collins: I am afraid, my Lord, I have misapprehended. With regard to the sections which I say I may jettison as it were, section 29 is perhaps as good an instance as any and section 32 which I have referred to. Indeed, my Lord, it is difficult to pick upon one section rather than another. You may take it that

the whole of part III. is strictly company provision, and if and so far as my learned friend's argument is that part III. is imposed upon a Dominion, by reason of the definition, my answer is, first of all, that the definition does not in fact cover it, because it excludes what contextually should be excluded. Further, that if they are, in fact, *ultra vires* you must so far as possible read the section as being *intra vires*; and thirdly, even if registration applies, or purports to apply those provisions to the company, it does not get rid of the obligation to registration. I was going to deal with the suggestion, and I think that is the last topic with which I need trouble your Lordships.

LORD PARMOOR: Sir John Simon put very clearly his view that the requirement to register or license was the *ultra vires* point, not these matters you are dealing with, which, as you say, I think quite properly, can be dealt with as being *ultra vires* the regulations. MR. HENN COLLINS: Yes, my Lord.

VISCOUNT CAVE: For myself I see some difficulty in saying that because the law otherwise requires it, therefore the context requires it. But that does not touch the same point. MR. HENN COLLINS: No, my Lord, I recognise the difference. It would apply to different sections. When your Lordships came to look at that in detail you would find that certain sections would be saved by the one and certain other sections would be saved by the other. They are sections where, clearly you must read "company" as applying by reason of the context and not by reason of the law. No doubt both would be required.

Then, my Lords, the provisions as to the case on which I was attacked are principally in section 129 which requires that: "Every company incorporated under this Act" which, of course, would exclude *ex facie,* a Dominion company, and "every company incorporated under any other Act of the province with limited liability, shall use the word 'limited' as the last word of its name in all notices, advertisements, and other official publications" and so on. Now, my Lord, it is interesting to observe that the Dominion Companies Act has a similar provision in their section 33: "The company shall keep its name, with the word limited after the name, painted or affixed, in letters easily legible, in a conspicuous position on the outside of every office or place in which the business of the company is carried on, and shall have its name, with the said word after it, engraven in legible characters, on its seal, and shall have its name, with the said word after it, in legible characters, mentioned in all notices, advertisements and other official publications of the company and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices and receipts of the company." So that, my Lord, we certainly do not impose any additional obligation on the company by that. It has got it already.

Then, my Lords, it was also suggested on the topic of "name" that section 10 had some bearing upon it. My Lords, I really mention that only just to dispose of it in a moment, because on the face of it section 10 applies only to a company to be incorporated under the Act. "A company may not be incorporated by a name identical with that by which a company in existence, if known to the Registrar, is already incorporated or registered or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in course of being dissolved and signifies consent" and so on. There again, it is obviously applying to a local company, as that alone can be incorporated.

My Lords, I think that really concludes the criticism that was made of the legislation in my case, and I do not desire to do more than adopt my learned friend's argument on the main principle. Your Lordships will remember that, as between myself and the other litigants, we are at arm's length, and no provision has been made with regard to costs, and that is a matter on which I must take the benefit or bear the burden.

VISCOUNT HALDANE: We do not as a rule make any order as to costs in these cases. MR. HENN COLLINS: I was only saying that there has been no convention between myself and the other side in point of fact, and whatever the benefit or burden may be I must take it.

MR. WALLACE NESBITT: May I ask your Lordships' indulgence for a few moments? I entirely forgot to deal with the question of Mortmain. If your

Lordships will look in document J, page 6, clause 15, your Lordships will see all I have to say upon that question in my case.

VISCOUNT HALDANE: Very well, Mr. Nesbitt. MR. WALLACE NESBITT: It is document J, page 6, clause 15. Our Act in Ontario was an entirely separate and specific Act relating to Mortmain. If your Lordships will look at that document, and that is coupled with Chief Justice Meredith's judgment. He covers the whole ground much better than I could possibly hope to put it before your Lordships.

VISCOUNT HALDANE: Now, Mr. Wegenast, what do you say to that? MR. WEGENAST: My Lords, my learned friends have given me a considerable amount of material to deal with.

VISCOUNT HALDANE: All the points we have had *ad nauseam* so that you deal with them shortly, Mr. Wegenast. MR. WEGENAST: Yes, my Lord, that is what I was going to say. The case is so very much before your Lordships that all that is necessary now is to indicate the points and without arguing them, and if I may begin at the end of the material which has been presented by my learned friends, I should like to refer to the point mentioned by Mr. Henn Collins as regards the name, "limited." Your Lordships will remember the expression in the John Deere Plow Company's case that it is for the Dominion to say in what fashion the company shall be permitted to trade. I submit that that covers the question of the name, and we find here the Province of Saskatchewan attempting to say in what fashion, that is, under what name, the company shall be entitled to trade in the province. My point may be put in this way: that when it comes to regulating the names under which corporations shall be entitled to trade, that no less than other items of corporate status is a matter for the Dominion. And while in this case there is no actual conflict, I referred in opening to this section as showing the sort of thing that the Act was aimed at, and as being one item demonstrating that this Act was a Companies Act and not a taxation Act.

Now, going back for a moment to the question which Mr. Henn Collins has raised as to the meaning of "company," may I point out in the first place that it is contended on the one hand that the province must discriminate—that is Mr. Collins' contention—and it is contended on the other hand that the Act is valid because it does not discriminate. It is quite clear, my Lords, that when it comes to passing company law, the law of the being of the company, regulations with regard to meetings of directors and so on, the points which my learned friend has referred to there the province must dicriminate, and not include a Dominion company, so that in that sense the province absolutely must discriminate, and he asks your Lordships to hold that because the province must discriminate it has discriminated, and he asks your Lordships to read the context as if the province had known so well that it must discriminate that it was not necessary to say so. Of course, it may be pointed out at once that the province apparently was not so sure of its ground, and that in 1918, I think it was, the Act was amended so as to give a more general construction to the word "company," but our action was brought before that time, before that amendment was made. When our action was brought, apparently by the province's own implied admission, it was at least arguable that "company" meant as it absolutely says it shall mean, a Dominion company throughout. We understood that the province did not discriminate as between us and the local companies in the matter of its application of company law, we understood this to be company law, and we understood the province to be attempting to put us on exactly the same basis as a local company, and to regulate us as such, and I submit it is absolutely clear on the face of the Statute that that was the provincial attitude. I submit that it is not open to the province to read into the context of the Act constitutional questions as to whether the Act is *ultra vires* or not. Surely the Act must be taken as it stands. The Act does not say that we are trying to enact only what we can enact. The province is in terms enacting what it purports to enact, and it is not open to say what it purports to enact, and it is not open to say with respect to any piece of provincial legislation that it must be read as cutting out all is *ultra vires* because if that were so this question would never come before your Lordships or would always come before your Lordships in the form of excising something on the

ground that the province did not mean to say it. Surely the point is not arguable. But the province has gone further than that, and has cast another implied doubt on this Act by another amendment in 1915 which is before your Lordships in that collection of Statutes.

VISCOUNT HALDANE: Which is that, Mr. Wegenast? MR. WEGENAST: That is the Corporation Taxation Act of Saskatchewan.

VISCOUNT HALDANE: Do you mean the extra-Provincial Corporations Act? MR. WEGENAST: No, my Lord, it is the Act of Saskatchewan which is immediately after the Yellow Act, my Lord, in that collection of Statutes, immediately after the British Columbia Companies Act. The yellow document is the British Columbia Act, and it is section 18 of that Act which follows. Your Lordships will find the province saying in effect: that if these fees cannot be supported under our Companies Act, we hereby transfer them to our Corporation Taxation Act; if we cannot collect them in one way we will do it in some other way. This is the third attempt of the province to square itself with the John Deere Plow Company's case, and apparently the idea is, my Lords, that if these provisions, being regulations made under the Companies Act are supported by an express provision in the Corporations Taxation Act then they may be valid.

VISCOUNT CAVE: Will you just explain this for me? I am referring now to section 22 of the Saskatchewan Companies Act. That is the one dealing with charitable companies? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: Then in section 18 of the Corporation Taxation Act I see: "any company not exclusively engaged in any of the businesses in respect of which taxes have been imposed by the foregoing provisions of this Act, or in farming, ranching, employment, telephone or such other businesses as may from time to time be determined by the Lieutenant-Governor-in-Council, shall, not later than the first day of January in each year, pay an annual fee to be prescribed by regulation." MR. WEGENAST: It is rather sub-section 2, my Lord: "Any regulation heretofore made by the Lieutenant-Governor-in-Council under the provisions of section 27 and 28 of the Companies Act"—that is this Act which is under discussion—"and in force at the time of the passing of this Act, shall remain in force." Your Lordships will see the implication in the word "remain." It is in pursuance of this same policy, my Lords, under which these companies, or at all events one of them, was asked to pay, as a condition of its recognition under the new Act of 1915, license fees under the old Act which by implied admission was *ultra vires*. My Lords, I ask your Lordships to consider that in connection with this—I must urge it because of the point that Mr. Collins raised in closing—we have not in the case of the Saskatchewan Acts, as we have in the others a convention with the Government. We thought we had it, but find we have not a convention with regard to the costs, and I have against me a very generous bill of costs in the Supreme Court of Canada.

VISCOUNT HALDANE: Now just let us see about that, because you are a private person in rather a different position. You brought your action—— MR. WEGENAST: In the McDonald case, my Lord, a shareholder brought an action through my learned friend Mr. Clark, and by arrangement between us there are to be no costs on either side.

VISCOUNT HALDANE: I think we had better have a note of all these things. MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: What was the McDonald case? MR. WEGENAST: That was one of the Saskatchewan cases, my Lord.

VISCOUNT HALDANE: And now we are dealing only with the case of Saskatchewan? MR. WEGENAST: Yes, my Lord. The question does not arise in the other cases, because we have an understanding that there are to be no costs on either side.

MR. WALLACE NESBITT: Nowhere throughout, my Lord. MR. WEGENAST: Yes, all the way down the line. There are to be no costs in the Manitoba and Ontario cases, but in the Saskatchewan case—in the McDonald case—there are to be no costs as between the appellant and the respondent.

VISCOUNT HALDANE: Not quite so fast, Mr. Wegenast. You say in the McDonald case there are to be no costs—— MR. WEGENAST: Not as between appellant and respondent.

VISCOUNT HALDANE: Does that mean no costs in the Court below? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: No costs anywhere? MR. WEGENAST: Yes, my Lord, no costs anywhere.

VISCOUNT HALDANE: Now that is the McDonald case. MR. WEGENAST: Now, my Lords, in the McDonald case the Attorney-General of Saskatchewan has taxed a Bill as Intervenant.

VISCOUNT CAVE: He has been paid? MR. WEGENAST: No, my Lord, he has not been paid, but he has an order for payment.

VISCOUNT HALDANE: But according to our practice here, Mr. Wegenast, we never allow any costs. MR. WEGENAST: I thought not, my Lord, but he succeeeded against me in the Supreme Court of Canada as Intervenant.

VISCOUNT HALDANE: It is for the Canadian Courts, when the province appears as Intervenant and takes part in an ordinary litigation, to deal with it, but when the question at issue is a constitutional question which comes up here for decision, and the Attorney-General of the province has intervened for his own convenience, we never give him any costs, and we do not make him pay any costs. MR. WEGENAST: I appealed to the practice in these Courts, my Lord, but I was unsuccessful.

MR. WALLACE NESBITT: It was the practice originally in the Supreme Court, my Lords, not to give any costs to an Intervenant.

VISCOUNT HALDANE: So I thought. I thought the Supreme Court did just the same as we do here. MR. WEGENAST: I thought so, too, my Lord, and I urged that was so, but not successfully.

MR. WALLACE NESBITT: Who gave them—the Registrar? MR. WEGENAST: Yes, the Registrar.

VISCOUNT HALDANE: I am bound to say that it is a matter for the Court of the province, and we should be very loath here to interfere with the Court of the province in any way. If he has done so, and it is a case of friendly arrangement, we should not intervene on that ground, Mr. Wegenast. We should consider it was a matter within the discretion of the provincial Court. MR. WEGENAST: Of course, my Lords, I am dealing with it from the standpoint of whether we succeed or fail in this case. If we succeeded, presumably the costs go with us all the way along the line, but in the two Police Court cases which were argued along with the McDonald case——

VISCOUNT HALDANE: That is the Saskatchewan case? MR. WEGENAST: Yes, my Lord. In the John Deere Plow case and in the Great West Saddlery case the Attorney-General for Saskatchewan also taxed a bill. There are three bills against us, although the argument was only one argument.

VISCOUNT HALDANE: Well, there again, what you get out of the province is not a matter for the Sovereign to deal with as a matter of costs. We can only follow our own practice and say that we think it is right. MR. WEGENAST: I am entitled perhaps to point to this, my Lord, that in the Police Court the arrangement which I thought we had prevailed, and the Police Court judgment is without costs.

VISCOUNT HALDANE: The Attorney-General got no costs? MR. WEGENAST: In the Police Court. The matter of costs was not mentioned as a matter of fact in the Supreme Court, but for some reason in the Supreme Court the judgment was given against us with costs, and the Attorney-General at once proceeded to tax his bill.

VISCOUNT HALDANE: In the Supreme Court of Canada? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: That is very odd, Mr. Nesbitt, because the Supreme Court of Canada generally agreed with the practice here. MR. WEGENAST: Not in the Police Court, my Lord.

MR. WALLACE NESBITT: It would be in the other cases your Lordship mentioned—as intervenant.

VISCOUNT HALDANE: I suppose in the Police Court cases the Attorney-General was merely there as representing the public authority? MR. WALLACE NESBITT: Yes, but he would get his costs in the case of appeal.

MR. WEGENAST: He was only prosecuting in one of the cases, my Lord.

VISCOUNT HALDANE: In the McDonald case he got his costs? MR. WEGENAST: Yes, as Intervenant, my Lord.

VISCOUNT CAVE: The appeals were dismissed with costs, I suppose? MR. WEGENAST: Yes, my Lord.

VISCOUNT CAVE: I see it is mentioned here in the judgment. MR. WEGENAST: Yes, my Lord. I must in duty to my clients take advantage of every detail of these cases, having in view the question of costs, and it is with that in view that I do ask your Lordships to examine most carefully this question.

VISCOUNT HALDANE: Supposing we were generally confirming—I do not express any opinion, and the only question was the question of costs, we should never interfere, Mr. Wegenast, with the Court's discretion as to costs. MR. WEGENAST: No, my Lords, but your Lordships might be with me in one of the cases and not in the others.

VISCOUNT HALDANE: We might, yes. MR. WEGENAST: Then in that case the question of costs would be of importance.

VISCOUNT HALDANE: Yes, but it is not likely we should modify the judgment merely on the matter of costs. However, Lord Sumner has put your argument to me very briefly: You want all the costs you can get out of the Saskatchewan Government; you want to deprive them of all the costs you can. We have that point fully before us and we will look into it. We do not entertain argument with regard to costs, nor are we willing to modify the judgment on the question of costs. MR. WEGENAST: However, I ask your Lordships to look into the facts of the cases with that in view past the Constitutional point.

VISCOUNT HALDANE: If we do not decide any Constitutional point I think you will find us very slow to decide anything about costs. I am not talking of here, but of the Court below. We do not do it, Mr. Wegenast. It is not the practice of the Sovereign. MR. WEGENAST: All that I am concerned with is this, that in case any Constitutional question should be decided against me, your Lordships should look carefully into the facts of the cases further, and see whether I have not sufficient ground in some of the cases to succeed, apart from the Constitutional question, because your Lordships will see that in the one case I am referred back to an Act which the province admits to be *ultra vires*. I am asked to do something which the province admits it had no right to do in the John Deere Plow case decision.

VISCOUNT HALDANE: Very well, we will look into that matter, MR. Wegenast. MR. WEGENAST: That is all I wish to say on that point, my Lord. Then, my learned friend Mr. Henn Collins put my argument as to what the province is trying to do in regard to these licenses in a way that was not my way. I put it to your Lordships that the attempt in the Saskatchewan Act was to take away our general powers which we had received from the Dominion, and to hand us back a set of local powers, as it were. That is in term what the Act does. It is putting the case on a very narrow ground, but technically quite tenable, I submit. The province manifestly has no jurisdiction over anything but the local powers, but it does say that we shall not carry on any part of our business, and then it says that after we get the license we can carry on business to the same extent as a local company. It is in my mind, as it were, simply an illustration of the real purpose of the Act, but on that narrow ground I think I am entitled to succeed.

Now, my Lords, this is another way in which the whole issue can be put. My learned friend Mr. Collins argued that the local company, after it had become incorporated under section 19 of the Saskatchewan Act, was clothed with all the capacities of a company. I follow that, and I admit that. The local company is clothed with all the capacity. That is not powers. Now the attempt of the Saskatchewan Act in my submission is to place a Dominion company in that same category as if it had nothing but capacities. That is the essence of the provincial attempt. That is exactly the respect in which the legislation is general and does not discriminate, but there, my Lords, the province must surely discriminate. This Dominion company is not a local company; it is not a group of local incorporators which has been taken up to this point, where it has merely capacity and no power. It is a company with power. Then, my Lords, reverting to the illustration used by Mr. Nesbitt, which I adopt and follow, of the use of the rooms—taking the Province

of Saskatchewan as a room—what the province here does is to offer to sell to the Dominion company a key to the room. My learned friend says that it is a pass key to all the rooms, but in essence the attempt here is to sell to the Dominion company a pass key on the same terms that it asks of its own local companies. In other words, it admits the Dominion company's capacity, but denies its power. That is the essence, of course, of the argument, and of course is the theory to which the Chief Justice of Ontario reverts in his judgment.

Now, my Lords, I do ask that my learned friend Mr. Henn Collins should be compelled to choose between the two horns of the dilemma: either his Act does discriminate, or it does not discriminate. If it does not discriminate, in the application of the whole Act, I say that the legislation is invalid, because it is company law, and the attempt of the province is to impose this company law on a Dominion company. If my learned friend's argument is that it does discriminate, then, of course, we are faced with the context of the Act. Now, my learned friend Mr. Henn Collins—this is the first point made by him, if I understand it——

VISCOUNT HALDANE: I think we had better adjourn at this point.

(Adjourned for a short time).

MR. WEGENAST: On the question of discrimination, my Lords, my submission may be put in this way. When it comes to company law or general regulations of trade which are within the jurisdiction of the Dominion the province *must* discriminate in such a way as to recognise the operation of the Dominion law, Dominion company law, and Dominion law giving this company authority to trade. In that respect the Provincial Act *must* discriminate. In respect to laws passed in the exercise of the jurisdiction of the province under an item in section 92 the province *ought not* to discriminate, because there might be arguments adduced on that head but I do say that if the province does discriminate it at once raises questions of status, because I do not at all adopt my learned friend's conception of status. The status of an infant, the status of a married woman always has reference to the status of other persons, it is always a matter of comparison, and when we find that a class or companies is singled out for treatment different from the provincial companies, or when we find a class of company created by the Dominion in the valid exercise of jurisdiction, under an item in section 91, singled out for inclusion with foreign companies, when you find that sort of discrimination, differential treatment, then we look for a different purpose from that which may appear *prima facie* on the face of the Act, and that is all the Bryden case illustrates. My learned friend has referred to the pernicious doctrine of pith and substance; it may be pernicious to his case, as it was to the Bryden case, but surely, my Lords, it is necessary in both cases to see what kind of legislation it is. That is all that pith and substance means. You must identify the legislation in every case, you must say this is taxation, therefore it is valid; this is property and civil rights, therefore it is valid; this is railway legislation, therefore it is valid; and that is the question of pith and substance; that is all there is in this pernicious doctrine; it is that one must ascertain the subject matter, one must see what the subject matter of the Act is. I say with respect to discrimination, that it is a circumstance, and a very significant circumstance, for your Lordships to have in view in assigning the identity of this legislation. That is the sense in which discrimination is important.

VISCOUNT HALDANE: You say it casts a light on the purpose of the legislation? MR. WEGENAST: Yes, a lurid light, if I may so put it, on the purpose of the legislation. My Lords, it is surely elementary. I do not think my learned friend quarrelled with the decision in the Bryden case. Perhaps it is implied in his argument that the British Columbia Legislature could single out a class of naturalised Chinamen for different treatment from the rest of the community; I think, perhaps, on second thoughts, my learned friend's argument does imply that; but what they said in the Bryden case was: We see what you are trying to do; we see what the purpose of this legislation is; you say that women and Chinamen shall not work in the mines; obviously women would not work in the mines anyway, that is a mere make-weight, really what you are intending to do is to say that Chinamen shall

not work in the mines, and you are aiming at a class of persons which has been given certain rights by the Dominion in the exercise of an item of jurisdiction in section 91.

Now my learned friend has referred to the Tomey Homma case. I thought my learned friend would avoid that case. If I understand my learned friend correctly he referred to the case as deciding that the consequences of naturalisation were for the province to determine, but my Lords that is exactly what the case does not decide. May I refer your Lordships to the case itself, because it is important.

VISCOUNT HALDANE: What year was it? MR. WEGENAST: In 1903, Appeal Cases, page 151.

VISCOUNT HALDANE: What the case decides is that the Provincial Legislature has the right to determine under section 91, sub-section 1. It is necessary to look to the sub-section to see what privileges, as distinguished from necessary consequences, shall be attached to it, and I want to point out that in the judgment the right to vote was held to be a privilege, and one which under the Statutes from the time of William III. down to Queen Victoria, was excluded from the consequences of naturalisation, because the Naturalisation Acts up to the time of Queen Victoria provided in terms that naturalisation should not carry the right to vote.

VISCOUNT HALDANE: Supposing the naturalisation were for the Dominion and they decided that a certain class were to have the status of say British Columbia born subjects, then the province would in allotting the right to vote amongst the different classes of voters, say it was to apply to people who had been naturalised for five years. MR. WEGENAST: Voting being a privilege and not an ordinary civil right.

VISCOUNT HALDANE: Yes. MR. WEGENAST: The distinction was of the very essence of the decision, that is to say, it was recognised that the consequences of naturalisation in respect of the civil rights of these persons as compared with civil rights of other persons in the province were a matter determined by the Dominion under Naturalisation and Aliens. When you come to voting, which was a matter for the province to regulate under its constitution, under the power which the province has to regulate its own constitution, then you had a field in which a province was quite entitled to discriminate.

VISCOUNT HALDANE: That is, separately. MR. WEGENAST: Yes. Sub-section, on which the Tomey Homma case is based, item 1 of section 92, is this: "The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the province except as regards the office of Lieutenant-Governor." That is to say, under its power to amend its constitution the province could say that women should have the vote, that persons must be of 25 years of age before they can vote. The province could also say what classes of persons should sit in the Legislature, but the Tomey Homma case was based directly on that sub-section, and the decision in the Bryden case with this pernicious doctrine of pith and substance was fully sustained. The passage of the judgment itself is at page 156: "The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalisation." I think that puts my submission correctly as it was put as a matter of fact by your Lordships in the John Deere Plow case in the argument; suppose the province said nobody except citizens of British Columbia shall have certain civil rights. There you would have the same question arising the lack of generality of the legislation, the attempt to establish a favoured class, the discrimination in that respect is, I submit, unjustifiable, or at least it would take a very strong justification, something which would negative the idea of intending to put a particular class at a disadvantage as compared with the rest of the community.

Now, my learned friend Mr. Lawrence referred to the fact that in the Manitoba Act consideration was given to the amount of capital employed in the province. I am quite free to admit his argument in that respect, that is to say, that if that provision is to be read as requiring the Lieutenant-Governor to exercise his powers thereunder, then it goes far enough to justify the imposition if it were a tax, if it had not the other conditions attached; but as a tax, if it were a tax, I do argue that it is a circumstance to be taken into consideration by your Lordships if your Lordships find that the tax is levied on the amount of authorised capital without regard

to the amount employed in the province. I call your Lordships' attention to this that in Canada it is the custom to a much greater extent than in this country for companies to secure authority to use a much larger capital than they intend to issue for the time being. In the Companies Act of Canada your Lordships observed not more than 10 per cent. of the capital need be put up before the companies commence business, and it is quite customary in Canada, in a new country where the needs expand quite rapidly, for incorporators desiring to issue a capital of one million to take a charter authorising them to issue ten millions. That is one of the reasons why this legislation bears with considerable weight on some of these companies. My learned friend referred to $150 as the fee. Well, my Lords, I have taken the trouble to see just what it would be in the case of the McDonald Company. The fee would be in Saskatchewan $1,540, in Manitoba $1,400, in Ontario $1,885. As a tax I submit that it is open to the objection that it is an attempt indirectly to create an imposition not only on capital outside the province, but on something which is not capital at all, but merely authority or franchise. It is really a sort of imposition on franchise rights or perhaps still more properly on incorporation rights because the mere power to issue capital, perhaps, is not a franchise, it is a mere incident of the charter.

Now as regards by learned friend Mr. Nesbitt's theory, that this license is merely a receipt, may I point in passing to the provisions for revocation of this license. Surely that means it is something more than a receipt. Surely it cannot be argued that this is merely a receipt. It is in essence under my submission an attempt to grasp the company, the license itself implies permission, it implies power to prohibit. It is not only in terms but in essence a license, it is not merely in form a license as it was in the Brewery case, but it is in essence a license subject to revocation in every one of the three provinces.

I do wish to press as strongly as I may my submission that it is not open to the province to treat the Dominion company as a foreign company, and its recognition merely a matter for comity. It is, indeed, arguable that the province are not the proper legislative body to extend comity to a foreign company, but whether that be so or not, there is no room for comity as between the province and the Dominion.

Then, my Lord, as bearing on the identity of these Acts, if I may adopt the argument of Mr. Newcombe in the John Deere Plow case, what is the sort of recital one would expect to preface an Act like the Ontario Act? Would not it be something like this: Whereas it is desirable to regulate the status of foreign companies in this province. Suppose the Acts to be confined to foreign companies without Dominion companies—whereas it is desirable to regulate the status of foreign companies in Ontario. Could any recital be suggested more suitable than that? My learned friend would argue, I suppose, that the proper recital is: Whereas it is desirable to have foreign companies report certain information, but is not it significant that for the schedule of information one must look to the Ontario Companies Act. Then the Companies Act presumably dictates the items of information with a view to regulate local companies; that is the purpose of the information required for the local companies; it is to regulate *qua* company, it is to see that their borrowing powers are not exceeded, that their prospectus properly sets out the facts, a great many lines of information which the province may properly desire by way of regulating the internal operations of the companies, the relations of shareholders and directors and so on; that is the information which the province requires under section 135 of the Ontario Act. We say it is a circumstance again strongly pointing to the identity of this legislation as company legislation. It is the sort of information that is required not for regulation of the trading of companies, but for the regulation of the internal relations of the company, the by-laws and so on.

I understand my learned friend Mr. Nesbitt to admit that the province has nothing to do with the internal management of the company. If that is so. of course it at once condemns the Saskatchewan Act under which we are brought in terms, under all the provisions of the Act without discrimination.

Now, just on that point my learned friend argued that it was desirable, necessary, perhaps, to harmonise the provisions of the Act. Well, it is fair to observe,

my Lords, that both on behalf of the provinces of Ontario and Manitoba and on behalf of Saskatchewan, it was found necessary to read out of the Act, for the purpose of assisting the argument, certain sections. Your Lordships will recollect that in the Ontario judgment the Chief Justice regarded certain sections as practically not being there. In the judgment in the Manitoba case the Judge of the Supreme Court took a similar view as to provisions of the Manitoba Act. My friend Mr. Collins asked your Lordships to read out of the Saskatchewan Act the bulk of the Act. Well, my Lords, it is at best a very difficult line of argument, and I point to this that we not only read nothing out of these Acts, but we do seriatim point to the different provisions as supporting our view as to what is the real purpose and real essence of the Acts.

On the point which Mr. Nesbitt raised as to whether the regulations which formed part of the Record were properly included or not, I point to the certificate of the Registrar of the Appellate Division of Ontario which certifies that these documents were a part of the record.

Mr. Wallace Nesbitt: I did not say they were not part of the Record. I said that upon their face they were merely departmental regulations, not under an Order-in-Council.

Mr. Wegenast: Following the usual practice the Record was settled between solicitors. As a matter of fact these documents were before us in argument only in informal shape. The Attorney-General had failed to produce them as exhibits in formal shape, and we used them in argument both before Mr. Justice Masten and before the Appellate Division, and it was not until after the argument in the Appellate Division as a matter of fact that we got the formad copies of the orders in Council from the Government Department but the certificate is on page 51 of the agreed Record.

My Lords, on the question of the operation of these Acts as a tax, if it can be called a tax, I have prepared an analysis of the decisions in the Brewers and Maltsters' case, and one or two other cases that I may mention, in the Supreme Court of Appeal. I submit this analysis not necessarily as authority, although I submit it is fully supported by authority, but as the only reasonable and proper construction to be placed on the disjunction as between item 2 of section 92 and item 9. You find in item 2 the province has the power to impose a direct tax. In fact, in item 9 the province has power to require licenses. When you have the two powers you see what is the exact disjunction. How far does this go? My first statement is "A tax may be imposed by way of a license fee." I admit that. The Brewers and Maltsters' case is an authority for that. "A tax may be imposed as a license if in the form of a license"; it is nothing against the tax that it happens to be imposed in the form of a license; I emphasise the word "form," as long as the license is a mere receipt. Next logically I submit, "But every license fee is not necessarily a tax."

Viscount Haldane: These are very plain propositions. Mr. Wegenast: Yes, but it is in the application of them, the ultimate conclusion, that the strength of my argument I submit lies. Then my third proposition is "Nor is every license fee authorised by item 9 of section 92." I suppose my learned friend argues that it is. I wish to refer a little more at length to the language of the Brewery case on that; "Otherwise if that were not so, as pointed out by Mr. Justice Taschereau, in *Parsons* v. *The Queen Insurance Company* in the Supreme Court Reports, there would have been no object in mentioning 'shop' and 'saloon' licenses and no specific power of taxation would have been necessary." If my learned friend is right in arguing as he does argue that you can license anything, that the province can license anything, then there is no necessity for special power of taxation. So that my Lords the power to license must be read as being limited in some way; it is not an unlimited power, otherwise there would be no meaning to be read into direct taxation. "Nor is the power of the province to impose license fees unrestricted even within the scope of item 9." Even within the scope of item 9 the provincial power would not be unlimited, it must come in with the exercise of Dominion power under section 91. "In any case a province could not under the guise of a license fee impose a fee which operated primarily as (a) an incorporation fee, (b) a restriction upon the trading purposes of a Dominion company *qua* company."

Now if I have carried your Lordships with me in the argument that item 9 must be read as having certain limitations and as establishing a genus, then my submission is that these Acts are not within the genus so established.

VISCOUNT HALDANE: You must remember what Lord Herschell said. I do not think there is much obscurity about it; Lord Herschell said "other licenses" must be interpreted generally if there is nothing to restrict it; he did not say you could issue licenses under the name for the purpose of acquiring powers that were properly Dominion powers. MR. WEGENAST: I heard your Lordship say that yesterday, and it rather alarmed me, because I thought it was otherwise in the case when I read the passage.

VISCOUNT HALDANE: Read the passage in Lord Herschell's judgment. MR. WEGENAST: "But their Lordships were not satisfied by the argument of the learned counsel for the appellants that the license which the enactment renders necessary is not a license within the meaning of sub-section 9 of section 92. They do not doubt that the general words may be"—

VISCOUNT HALDANE: You see "may be." MR. WEGENAST: Yes. "They do not doubt that general words may be restrained to things of the same kind as those particularised, but they are unable to see what is the genus which would include 'shop, saloon, tavern' and 'auctioneer' licenses and which would exclude brewers' and distillers' licenses."

VISCOUNT HALDANE: That was alluding to a well-known rule of construction which is very well established, that unless you can find a genus for the general words "other" must be interpreted generally.

VISCOUNT CAVE: You must finish the sentence. MR. WEGENAST: Yes, he does not deny there is a genus; he says in terms there is a genus, I assume there is a genus. He says, "but they are unable to see what is the genus which would include 'shop, saloon, tavern,' and 'auctioneer' licenses and which would include brewers' and distillers' licenses." That is to say, there is a genus.

VISCOUNT HALDANE: They are unable to say what the genus is. MR. WEGENAST: That would include shop, saloon, tavern and auctioneer, but not include a brewer or maltster. I submit that there is a genus which would include shop, saloon, tavern or maltster, but will not include licenses for corporate capacity; that is my submission.

It will not include a general license to trade, if I may so put it; after all item 9 refers to particular trades or callings. It is, of course, admitted that the province has jurisdiction to regulate the local carrying on of particular trades or callings, and it is of the essence of our case that that point should be clearly made. Mr. Nesbitt's argument, as I understand it, treated general regulation of trade and commerce as being the same thing as the regulation of particular trades, and, my Lord, this Board has, in a number of cases, clearly established the distinction. May I refer to the case of the *Citizens Insurance Company* v. *Parsons* again?

VISCOUNT HALDANE: Just remind us what was said. I think every line in that case has been read here about six times. MR. WEGENAST: Yes. "It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade." That is, the trade of a brewer or maltster. In the insurance case we have the obverse; at page 596, of 1916 Appeal Cases, we have the same distinction employed. "Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces." That is to say, the Dominion cannot do that thing, the provinces can. But, on the other hand, my Lord, the Dominion can establish general regulations of trade of the kind with which the decision in the John Deere Plow case is associated, that is, the regulation of the trade of a Dominion company, and the province cannot, and that is where these Acts offend as we claim, that they are an attempt to regulate in a general way, in the general sense which is forbidden to the provinces, the trading of these Dominion companies. It is quite arguable, my Lord, that in their operations on inter-provincial trade these Acts are invalid as establishing a bar between the provinces.

My learned friend referred to the fact that a company, the Dominion Steel Company, had been incorporated since the decision of the Supreme Court of Canada in this case, with a provincial charter; I think that is quite conceivable; I think it is fairly arguable. I point out further that another very large company, the Consolidated Rubber Company, has divided its business into nine component parts amongst the different provinces, with nine, not quite so many at the beginning, but as many charters as there are provinces in which it trades, as the result of the Supreme Court judgment. I ask your Lordships to take that into consideration as a fact which would follow this sort of legislation. It would be necessary for this large company to do that sort of thing. That is why I appeared in the Company Reference on behalf of some 2,000 companies to argue against that dilemma, just what the dilemma would be if these companies were denied their powers under the Dominion Companies Act.

Now as regards the distinction between capacity and authority, having in mind a question asked by Lord Cave, I do want to refer, if I may once more, to the passage in the Insurance Reference judgment, in which your Lordships said this: I think your Lordships all know the passage, if I may paraphrase it at once, if I do not do it correctly it will simply recoil on me: That the Dominion company got something more than the provincial company; it got an authority; if a company is satisfied to take powers confined to a province with capacity to go outside the province, it can get that from the province, but if it wants authority or something more than capacity then it can get it from the Dominion.

Now as regards the generality of the treatment by the Provincial Acts, and having particularly in mind the argument of my learned frieid, Mr. Lawrence, may I ask your Lordships to consider what would be the result if the provisions respecting suing and being sued were included in an Act respecting the administration of justice, as the Judicature Act, and the provisions then were that a company should not be considered as being entitled to sue and be sued till it obtained a license and paid a fee, and that after doing this it should have the same power to sue and be sued as if it was incorporated under the Local Companies Acts. My Lords, would that provision be valid? That is my way of putting my argument. Would that provision be valid in an Act respecting the administration of justice? Could the Judicature Act of the province validly enact that a Dominion company, before it could sue or be sued, was to do these things, and after that it should have the same powers as a local company gets under this Companies Act? That, my Lords, I submit, at once discloses the discrimination which is effected by these Acts. I submit that the provision could not be validly enacted in the Judicature Act. In the same way, my Lords, I submit that the provision respecting the holding of land which is only another item of corporate power, although it has been discussed in some of the cases by way of illustration in such a way as to single it out, that the powers to hold land could not be dealt with in a Holding of Land Act, or a Mortmain Act in that discriminatory way, and that if you find in an Act purporting to require companies to take out a license a provision that a Dominion company and a foreign company must take out a license, and that when those companies have taken out their licenses they have exactly the same powers as a local company, you would have a basis of discrimination which would support the charge that the Act dealt with status, recalling what my submission was as to the real considerations when one comes to examine status.

I point out that in the language quoted from the passage in the argument, the language of my Lord Sumner, it was said, that in order to succeed in the John Deere Plow Company case the respondent would have to justify the whole of Part 6. That, of course, at once covers the question as to what was decided in the John Deere Plow case, if that passage is to be taken as bearing on that.

My learned friend, Mr. Nesbitt, referred to the Bonsecours case; I am going to refer to that as establishing this very distinction between the Dominion legislating against Dominion railway companies, as it was in that case *qua* railway companies on the one hand, and *qua* citizens of the province with ditches to keep up on the other, and it was said that the whole basis of the decision in the Bonsecours case was that only the Dominion could regulate the company *qua* railroad, and that if any item of the Acts of the Dominion could be brought under the necessities of

railroading, then, of course, they would prevail over any provincial legislation, but that that did not displace the power of the province to legislate as against the creation of nuisances and so on.

Now, my Lords, in order to avoid going into detail, and by way of summing up the submissions I have to make in reply, may I read to your Lordships a brief summary of the points which I prepared during the intermission by way of avoiding undue repetition.

VISCOUNT HALDANE: Tell us what they are; I think we have all your points very fully. MR. WEGENAST: First: "The Provincial Statutes are company law. The company law of a Dominion company is made by the Dominion. Second. The Provincial Acts are not taxation Acts. They would not be regarded by the Speaker of the House of Commons as revenue bills. The Imperial Companies Act was not regarded as a taxation measure when it went through Parliament." The third is: "If and in so far as the Provincial Acts are directed at revenue, it is by way of conserving the provincial royalties from incorporation of companies and deterring incorporators of trading companies from going to the Dominion for their charters. Fourth: To hold that the provincial enactments were taxation Acts would be to extend the *Bank of Toronto* v. *Lambe* (a) To an imposition based on the total authorized capital of a company without regard to the extent of the company's business in the province." That would be the *Bank of Toronto* v. *Lambe*. "(b) To an imposition sanctioned by prohibitions and disabilities affecting corporate status." That was not the *Bank of Toronto* v. *Lambe*. "(c) To an enactment imposing provincial company law on a Dominion company." That is undoubtedly the case in Saskatchewan. That would be an extension of the *Bank of Toronto* v. *Lambe*. "(5) The Dominion power to incorporate companies includes the right: (a) To create an artificial entity: (b) To endow this entity with certain powers or rights or a certain franchise; (c) To regulate the corporate constitution in such matters as the inter-relation of shareholders, directions, etc; (6) The power to hold land is only one of the items of corporate power conferred by the Dominion. It stands on no different basis than the power to hold personal property or the power to sue and be sued. (7) While the Dominion company is subject to general laws respecting Mortmain, it is not subject to provincial laws designed to place Dominion companies as a class in a disadvantageous position as compared with provincial companies. (8) If the provisions respecting the power to sue and be sued were contained in a Statute dealing with the administration of justice they could not have the same effect as in these provincial Acts without disclosing their differential or discriminatory nature. (9) Similarly, the provisions respecting the holding of land if contained in a general Mortmain Act could not be given the effect they have in these Statutes without disclosing their discriminatory nature. (10) The provincial enactments purport to place the Dominion companies in the category of a foreign company as if the recognition of their corporate status were a matter of comity on the part of the province. (11) The provincial enactments are directed at a class created by the Dominion in the exercise of an item of exclusive jurisdiction. (12) The Dominion has the exclusive right to regulate the terms and conditions under which a Dominion company may operate: (a) *Qua* company; (2) *qua* general regulation of trade. (13) The province has power to regulate a Dominion company along with other companies and persons in respect to its carrying on of a particular trade or calling. (14) The Brewers and Maltsters' case was a case of regulating a particular trade of calling. (15) Item 9 of section 92 must be read in the light of the *ejusdem generis* rule. A license on corporate capacity is not *ejusdem generis* with a shop, saloon, tavern of maltster's license. Nor is a general license to trade *ejusdem generis*." That is all that I have to say to your Lordship in reply.

VISCOUNT HALDANE: Their Lordships will take time to consider the advice that they will tender to His Majesty.